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Supreme Court, U. S.
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NO.

in the Supreme Court of the United States

October Term, 1980

J. F. HOFF ELECTRIC COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, and LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 9, 1981

QUESTION PRESENTED

Whether and to what extent the "work relatedness" standard previously applied by this Court for assessing the lawfulness under Section 8(b)(4) of the National Labor Relations Act of separate gate picketing at struck industrial plants should also be applied to all separate gate picketing at construction sites in view of the inherent functional interdependence among construction contractors.

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NATIONAL LABOR RELATIONS BOARD, and LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. F. Hoff Electric Company respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on September 12, 1980.

OPINIONS BELOW

The decision and order of the National Labor Relations Board, adopting and incorporating the findings of fact and conclusions of law of the Administrative Law Judge, is reported at 241 N.L.R.B. No. 98 (1979), and is reproduced in the Appendix at pages 40-63, *infra*. The opinion of the Court of Appeals is reported at ___ F.2d ___ (D.C. Cir. 1980), and is reproduced in the Appendix at pages 1-39, *infra*.

JURISDICTION

The judgment and opinion of the Court of Appeals, with Judge Wilkey dissenting, was entered on September 12, 1980. On December 1, 1980, Mr. Chief Justice Warren E. Burger extended the time for filing a petition for writ of certiorari to and including January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

The federal statute involved is the: National Labor Relations Act, Section 8(b)(4), 29 U.S.C. §158(b)(4) (appearing in the Appendix at pages 64-66, *infra*).

STATEMENT

In 1977, Petitioner, J.F. Hoff Electric Co. (Hoff) was the electrical subcontractor on a residential construction project in North Palm Beach, Florida known as Old Port Cove Village. Pursuant to Hoff's contract with the general contractor, Hoff was obligated to install certain interior lighting fixtures.[1] Hoff's contract did not require him to supply the fixtures; nor did Hoff submit a bid to supply the fixtures. The fixtures were provided, consistent with common area practice, by the project's owner-developer, Old Port Cove Village, Ltd.

On November 7, 1977, the Union[2] began picketing Hoff at the Old Port Cove Village construction site with informational picket signs complaining of Hoff's noncompliance with the Union's "area standards".

At or before the onset of the picketing, the general contractor established a "reserved gate system" by placing signs restricting the use of the only two entrances to the project. At the northern entrance a sign was posted reserving that entrance for the use of Hoff employees, its suppliers and certain other subcontractors. The use of the southern entrance located approximately 500 feet to the south was reserved for the general contractor, the project owner, and other subcontractors and their suppliers.

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[1]Hoff's bid estimated that only 144 man hours out of 4,706 required for his subcontract were to be performed installing the fixtures.

[2]International Brotherhood of Electric Workers, Local 323.

For well over a month, or until December 28, 1977, the Union's picketing was confined to the general vicinity of Hoff's reserved gate, i.e., the northern one-fourth of the site's western boundary. However on that day and for a least 3 to 4 days thereafter, the Union, without notice, expanded its picketing to include, not only Hoff's gate but also the south gate and the entire 1600 feet of the site's western boundary. Ostensibly, the Union's picketing of the south gate and the rest of the western boundary was premised upon what the Union believed to have been a violation of the south gate's neutrality several days earlier.

Specifically, on a day late in December, one of the Union's picket captains observed a truck owned by Consolidated Electric Supply Company enter and exit the south gate. The pickets did not observe the truck make a delivery and only assumed, because of their knowledge that Consolidated Electric was an electrical supply house, that the jobsite visit was related to Hoff's presence at the project.[3]

At no time, however, did the Union notify Hoff, the project owner or the general contractor, who established the reserved gate system, of the reason for its expanded picketing.

Thereafter, following receipt of a letter from Hoff's attorney on December 30, 1977 advising that Hoff

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[3]It was later developed that Consolidated Electric made regular weekly deliveries of electrical fixtures to the project and that Hoff's employees unloaded the fixtures on one occasion. Such testimony was given by an employee of the project owner, not by any of the Union's representatives.

employees and suppliers would continue to use only the primary-north gate and consulting with counsel, the Union belatedly withdrew its pickets from the south gate for a distance of 150 feet to the north and south. The Union continued to picket along the remaining 1,300 feet of the project site's western boundary. This picketing pattern continued until the end of January, 1978, when the Union's picketing was limited to 25 feet on either side of the primary-north gate by a temporary injunction granted by the United States District Court for the Southern District of Florida pursuant to Section 10(1) of the Act.[4]

Acting upon the unfair labor practice charge lodged by Hoff, a panel of the National Labor Relations Board affirmed its Administrative Law Judge in a 2-1 decision and concluded that the south gate's neutrality had been breached by the delivery to the project owner of electrical fixtures by Consolidated through the neutral south gate, thereby permitting the Union to picket that gate at all times. Relying on its prior decision in *Linbeck*,[5] the Board resolved that "any gate used to

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[4]N.L.R.B. v. Local Union 323, International Brotherhood of Electrical Workers, Case No. 78-8016-Civ-WJC (S.D. Fla. 1978).

[5]International Union of Operating Engineers, Local Union No. 451, AFL-CIO (Linbeck Construction Corp.), 219 N.L.R.B. 997 (1975), *enforced* 550 F.2d 311 (5th Cir. 1977).

deliver materials *essential* to the primary employer's normal operations is subject to lawful picketing".[6]

This result prompted a crisp dissent from Member Murphy who reasoned that the terms "essential" and "normal operations" must be applied in context and that those terms are delimited by the extent to which a contractor is contractually obligated to perform on a construction project. Where as here the contract does not call for the furnishing of the goods or materials, their delivery is unrelated to that contractor's "normal operations" at the site. Moreover, Member Murphy noted the fixtures herein could not be equated to the raw materials in *Linbeck* which the contractor converted into a finished product at the construction site.

Drawing its essence from *General Electric*[7] the Court of Appeals majority affirmed the Board. Discounting contractual relationships, the majority opinion endorsed a "common sense" definition of supplies and held that if Consolidated was delivering supplies used by Hoff in its normal course of business, Consolidated was a "supplier" of Hoff.

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[6]App. B, *infra*, p. 41. It should be noted that two current Board members do not follow *N.L.R.B. v. Denver Building and Construction Trades Council* 341 U.S. 675 (1951) in reserve gate cases where the dispute is with the general contractor as opposed to a subcontractor and picketing also occurs at a subcontractor's gate. *See, e.g., Sacramento Area District Council of Carpenters*, 244 N.L.R.B. No. 139 (1979).

[7]*Local 761, International Union of Electrical, Radio and Machine Workers v. N.L.R.B. (General Electric Co.)* 366 U.S. 667 (1961).

Judge Wilkey, dissenting, concluded that *Denver Building Trades* [8] and *General Electric* both retain full vitality. To reconcile the decisions despite conflicting rationale, Judge Wilkey found it necessary to limit *General Electric* to industrial plants of primary employers and apply *Denver Building Trades* to common situs construction projects.

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS VITAL QUESTIONS OF FEDERAL LABOR POLICY THAT MUST BE DECIDED AND SETTLED BY THIS COURT.

Section 8(b)(4)(B) of the Labor Management Relations Act, as amended, 29 U.S.C. §158(b)(4)(B), provides in pertinent part that it shall be an unfair labor practice for a labor organization or its agent

> (i) . . . to induce or encourage any individual employed by any person . . . to engage in, a strike . . . or (ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is —
>
> (B) forcing or requiring any person . . . to cease doing business with any other person . . . *Provided*, That nothing contained in this

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[8] *N.L.R.B. v. Denver Building and Construction Trades Council (Gould & Preisner)* 341 U.S. 675 (1951).

clause (B) shall be construed to make unlawful, where not otherwise unlawful, any . . . primary picketing.

Section 8(b)(4) is intended to implement "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Building and Construction Trades Council (Gould & Preisner)*, 341 U.S. 675, 692 (1951).

The distinction between lawful primary picketing and proscribed secondary pressure is never an easy one to make. However, where the primary employer and the neutral employer occupy the same job situs, as is so frequently the case in the construction industry, an added difficulty arises.

To facilitate this distinction and to allow traditional appeals by a union to primary employees while minimizing their impact on the business of secondary employers, the Board, with this Court's approval,[9] devised what have become known as the *Moore Dry Dock*[10] standards. The oft cited rule enunciated by the Board provides:

When a secondary employer is harboring the situs of a dispute between a union and a primary

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[9]*See Local 761, International Union of Electrical, Radio and Machine Workers v. N.L.R.B. (General Electric Co.)*, 366 U.S. 667, 669 (1961).

[10]*Sailors' Union of the Pacific, AFL (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950)

> employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and situs qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of [the] dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

92 N.L.R.B. at 549 (footnotes omitted).

Subsequently, the board further refined the third *Moore Dry Dock* criterion when it developed the concept of separate reserved gates as a means of isolating the labor dispute to the primary contractor working on a common situs and avoiding the unnecessary involvement of neutral employers. In *Building & Construction Trades Council of New Orleans (Markwell and Hartz, Inc.)*, 155 N.L.R.B. 319 (1965), *enforced* 387 F.2d 79 (5th Cir. 1967), *cert. denied* 391 U.S. 914 (1968) the NLRB concluded that the union had violated Section 8(b)(4) (i) and (ii)(B) by failing to meet the "reasonably close" test when it picketed gates on a construction site reserved for the exclusive use of neutral employers and their suppliers. The Board reasoned that if it is an offense to fail to indicate clearly that the dispute is with the primary

employer, "it is self-evident that picketing a gate used solely by the neutral subcontractors demonstrates the same purpose." 155 N.L.R.B. at 326.

In *Denver Building Trades* this Court held that although a general contractor and its subcontractors were commonly employed on a common situs construction project and the former exercised some supervision over the latters' work they remain independent contractors in the application of Section 8(b)(4) of the Act.[11]

This Court stressed: "The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so."[12]

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[11]This case has generated annual attempts by construction craft unions to obtain "common situs" picketing legislation in order to overrule this Court's decision. *See, e.g.*, H.R. 9070, H.R. 9089, H.R. 9373, and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress, 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); H.R. 4726 (93rd Congress, 1973); H.R. 5900, S. 1479 (94th Congress, 1975). The 1975 House Report accurately describes how that year's proposed legislation would have altered the meaning and effect of Section 8(b)(4) as interpreted by this Court in *Denver Building Trades:*

> "The bill treats the contractors and the subcontractors engaged in a single project as a single person for purposes of the secondary boycott provisions of the law." H.R. Report No. 94-06, at pp. 6-7.

The Petitioner submits that the proponents of common situs picketing have effectively obtained through this instant decision "the prize that eluded them in Congress" (App. A at p. 38).

[12]*N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. at p. 690.

Ten years later this Court endorsed the principle in *General Electric* that pickets striking a manufacturing plant could not picket a separate plant gate unless the workers of subcontractors using that gate were engaged in work related to the normal operations of the struck plant or performing work which would curtail the plant's operations in the strike's absence.[13]

Later still in *Carrier Corporation*[14] this Court reemphasized that "neutral delivery men furnishing day-to-day service essential to the plant's regular operations"[15] were fairly subject to picketing at a railroad spur adjoining the primary situs.

The "tension"[16] created by an accomodation between *Denver Building Trades* and *General Electric* when resolving the extent to which Section 8(b)(4) applies under these facts demonstrates the critical need for guidance from this Court. Nearly thirty years have passed since *Denver Building Trades* was decided and almost twenty have lapsed since *General Electric.* No decision of this Court has directly addressed the issues presented herein.

The Court of Appeals incorrectly constricts the vitality of *Denver Building Trades* to a clarification of

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[13]*Local 761, International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 366 U.S. 667 (1961).

[14]*United Steelworkers of America v. N.L.R.B.*, 376 U.S. 492 (1964).

[15]*Id.* at p. 499.

[16]App. A at p. 23.

Section 8(b)(4)'s ban on secondary activity between construction contractors at the same construction common situs. The Court of Appeals further reasoned:

> We can thus find in *Denver Building* no abiding principle to control this case. The decision does not answer the question of who is a customer or supplier of a primary employer; it simply held that not all contractors on a construction project can be considered the same employer for the purposes of picketing and strikes.[17]

The Court of Appeals looked to *General Electric* rather than *Denver Building Trades* in resolving its quest as to who is a "supplier" or "customer" of a picketed primary construction contractor.[18] The Court of Appeals focused solely on whether employees of the picketed primary employer use or install the goods in question. If so, then the source of the goods *ipso facto* becomes a "supplier" and can be picketed when delivering to the common situs.[19]

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[17]App. A at p. 12.

[18]Aside from its improper accommodation of the two cases, the Court of Appeals failed to draw a distinction between the nature of the picketing in *General Electric* vice that in the instant case. Here, Hoff was being subjected to only an informational picket, ostensibly for the purpose of truthfully advising the public of the wages and fringes being paid by Hoff. In sharp contrast, all *General Electric* plant employees were engaged in an economic strike.

[19]App. A at pp. 15-16.

As Judge Wilkey aptly illustrates in dissent such an accommodation between *General Electric* and *Denver Building Trades* is not justified.

> Our problem in the present case is that Consolidated Electric Supply Co. (Consolidated) appears to be both a common situs independent contractor *and* a supplier of Hoff Electric Co. (Hoff), the primary employer against whom the union bears its grievance. Consolidated seems to be an independent contractor within the *Denver Building* rule, because it has a separate arrangement to provide materials to the owner of the construction project on which Hoff works, an arrangement contracted for before Hoff was selected as the electrical subcontractor. On the other hand, Consolidated seems to be a supplier of Hoff within the *General Electric* rule, since the lighting fixtures it provides are installed by Hoff's electricians.[20]

To begin with, the Court of Appeals ignored the realities of construction project interrelationships. The owner-developer and Consolidated's relationship with Hoff typifies the way business is done on construction projects. Owners and general contractors customarily select, order and pay for supplies and articles to be installed by subcontractors.[21]

Similarly, many general contractors own or rent large cranes or elevators which may be utilized in

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[20]App. A at pp. 23-24.

[21]*See, e.g., United Brotherhood of Carpenters and Joiners of America*, 203 N.L.R.B. 1112, 1115 (1973).

common by all the subcontractors on a multi-story building project to transport men and materials from ground level to the floor in progress. Again, although the subcontractors would not be obligated to furnish a crane and the crane would hardly qualify as supplies in the conventional sense, under the Board's broad test as approved by the Court of Appeals, the general contractor would be considered a "supplier".[22]

A further vice of the Court of Appeals' approach is that ordinarily, the term "supplier" defines a relationship between two parties which of necessity hinges upon a contract between them wherein one party is legally obligated to furnish materials to the other. It has never encompassed a relationship in which one party simply contracts to provide services to another with respect to goods or materials owned by the latter. Indeed, to adopt the Court of Appeals' definition of "supplier" and apply it in black letter fashion to all circumstances creates results which fly directly in the face of the longstanding principle that, in developing standards by which to measure the legality of common situs picketing, the controlling consideration is to require that the picketing be conducted so as *"to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness*

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[22] *See Quarterly Report of the NLRB General Counsel* (4th Quarter 1978), 101 LRR 190-191 (1979), where the General Counsel concluded that a general contractor tainted a neutral gate by using it to deliver a crane to be used by the primary subcontractor. Significantly, however, the General Counsel ruled that the tainting of the neutral gate did not invalidate the reserved gate system forever but only for the isolated days on which the neutral gate was used improperly.

of the picketing in reaching the primary employees." (Emphasis in original) *Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market)*, 116 N.L.R.B. 856, 859 (1956), *enforced* 249 F.2d 591 (9th Cir. 1957).

By defining a supplier as it did in the instant case, the Court of Appeals is effectively *maximizing* rather than *minimizing* the impact of picketing, and in this case informational picketing, particularly in the construction industry. *Moore Dry Dock*[23] is as much a rule of limitation as it is a rule of access. *General Electric* recognizes this:

> The application of the *Dry Dock* test to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the 'dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.' *Labor Board v. Denver Building Council, supra*, at 692.[24]

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[23] *Sailors' Union of the Pacific, AFL (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950).

[24] *Local 761, International Union of Electrical, Radio and Machine Workers v N.L.R.B.*, 366 U.S. 667, 679 (1961).

The Court of Appeals noted in dictum that *General Electric* also permits the picketing of a struck employer's customers.[25]

If "common sense" customer relationships are applied as the Court of Appeals applies "common sense" supplier relationships at a common situs contruction site, they, as a general rule, will be broader still than such "supplier" relationships. Each subcontractor pursuant to contract performs services which are used or received by the general contractor. In effect then, the general contractor is a "common sense" customer of each subcontractor and would be "fair game" for picketing during a labor dispute involving any one of the many subcontractors.

If the Court of Appeals' decision is permitted to stand, little remains of *Denver Building Trades.*

It is firmly established that a secondary employer is not converted to the status of a primary employer merely because the neutral secondary employer provides an integral function to or constitutes an indispensable cog in the business operations of the primary employer. The Second Circuit has noted:

> Second, the integration of . . . operations on a merely functional plane is an improper basis for concluding that both have primary employer status under the secondary boycott provisions. That approach has been expressly rejected by the Court. *NLRB v. Denver Building and*

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[25]App. A at p. 17.

> *Construction Trades Council, supra.* As in *Denver Building and Construction Trades Council, we have two independent contractors who are operating from the same situs — the relationship between the two concerns is one of merely 'doing business'. Since the object of every secondary boycott is really to cause a cessation of business between two independent companies, the Labor Act's prohibitions would be nullified if a union were allowed to claim that the very business relationship it seeks to end makes both parties 'primary' employers.*

N.L.R.B. v. Milk Drivers and Dairy Employees Local Union No. 584 (Old Dutch Farms, Inc.), 341 F.2d 29, 32-33 (2d Cir. 1965), *cert. den.*, 382 U.S. 816 (1965) (Emphasis added.)[26]

While the cases cited do not involve construction industry common situs, the principles articulated therein are nonetheless applicable since, in essence, under the reserved gate doctrine, a neutral secondary gate is the

[26]*See also N.L.R.B. v. Truck Drivers & Helpers Local No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (National Trucking Co.)*, 228 F.2d 791 (5th Cir. 1956); *Western States Regional Council No. 3 International Woodworkers of America, AFL-CIO (Priest Logging, Inc.)*, 137 N.L.R.B. 352 (1962), *enforced*, 319 F.2d 655 (9th Cir. 1963); *McLeod v. Local 810, Steel, Metals, Alloys, and Hardware Fabricators and Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 182 F.Supp. 552 (E.D.N.Y. 1960); *National Maritime Union of America v. N.L.R.B. (Farmers Union Grain Terminal Assn.)*, 367 F.2d 171 (8th Cir. 1966), *cert. den.*, 386 U.S. 959 (1967).

equivalent of a physically separated neutral secondary situs.[27]

Further, many reasons contribute to the proliferation of labor strife in the construction industry, not the least of which is Section 8(f) of the National Labor Relations Act (Act).[28] That Section allows "prehire" agreements in the absence of demonstrated union majority support and encourages construction craft unions to engage in "top down" organizing by using economic weapons rather than employee persuasion to gain recognition.[29]

As this Court recognized, one of the aims of Congress in passing the 1959 amendments to the Act was to curtail this "top down" organizing.[30] In this respect, it should be noted that Congress prohibited under certain circumstances the disruption of supplies, still another factor overlooked by the Court of Appeals when it adopted its expanded concept of "supplier". 29 U.S.C. §158 (b)(7)(C).

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[27]*See International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 v. N.L.R.B. (R.F. Erection)*, 598 F.2d 1154 (9th Cir. 1979); *Bricklayers and Stone Masons Union, Local No. 2 v. N.L.R.B. (Assoc. General Contractors of Minnesota)*, 562 F.2d 775, 785 (D.C. Cir. 1977).

[28]29 U.S.C. §158(f).

[29]*See, e.g., Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

[30]*Id.*, at p. 632.

Judge Wilkey in his dissent concludes that since *Denver Building Trades* recognizes the close functional interrelationship between contractors at construction sites and yet preserves their independent status for purposes of Section 8(b)(4), the *Denver Building Trades* standard is at odds with the *General Electric* standard.[31] And yet *General Electric*, the later case, cites *Denver* approvingly on a collateral point.[32]

Thus, Judge Wilkey concludes that to afford each decision full vitality in its respective sphere is to restrict the application of *General Electric* to primary employers' manufacturing plants.[33] Such an accommodation respects the high degree of functional integration on construction projects and maintains the delicate balance of "shielding unoffending employers and others from pressures and controversies not their own."[34] Hoff submits that Judge Wilkey's accommodation of the two cases is the correct one.

II

THE DECISION CONFLICTS IN PRINCIPLE WITH THOSE OF OTHER CIRCUITS

Both the Sixth and Ninth Circuits have categorically rejected the notion that the *General Electric* work

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[31]App. A at p. 30.

[32]App. A at p. 32.

[33]App. A at p. 32.

[34]App. A at p. 33.

relatedness rationale extends to independent contractors at common situs construction sites. The Sixth Circuit has stated that:

> Neither of these cases dealt with the construction industry. Nor do we read them as adversely affecting the strength of the cases we have just discussed.[35]

The Ninth Circuit has also concluded that:

> . . . the Supreme Court's 'related work' doctrine of *General Electric* was devised for the everyday operations of an industrial plant or commercial enterprise, and was not intended to alter the Board's *Moore Dry Dock* approach towards resolving the legality of union picketing at common situs construction projects.[36]

The status of the "work relatedness" doctrine in the Fifth Circuit is not nearly so crystalized. The Fifth Circuit in *Building & Construction Trades Council of New Orleans v. N.L.R.B. (Markwell and Hartz, Inc.)*, 387 F.2d 79 (5th Cir. 1967) *cert. denied* 391 U.S. 914 (1968) refused to apply *General Electric* to construction projects. On the other hand, that Circuit in a later

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[35] *N.L.R.B. v. Nashville Building and Construction Trades Council*, 383 F.2d 562, 566 (6th Cir. 1967).

[36] *Carpenters Local 470 v. N.L.R.B. (Mueller-Anderson, Inc.)*, 564 F.2d 1360, 1362 (9th Cir. 1977).

case[37] involving, as here, the status of a construction situs "supplier", took a different tack.[38]

The Court of Appeals attempted to qualify its stance on *General Electric* by stating that its holding was "more narrow".[39] This prompted Judge Wilkey in dissent to respond:

> Apparently mindful of the weight of this authority, the majority states that it is applying a 'far narrower concept' than the *General Electric* standard, a concept 'fully consistent with *Denver Building.*' But throughout its opinion the majority relies on reasoning drawn directly from *General*

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[37]*International Union of Operating Engineers, Local Union No. 450, AFL-CIO (Linbeck Construction Corp.)*, 550 F.2d 311 (5th Cir. 1977).

[38]The decision in *Linbeck* was heavily relied upon by the Board and the Court of Appeals in the instant matter. Although *Linbeck* is distinguishable on its facts (App. A p. 36 n. 30), to the extent its reading of the law departs from Judge Wilkey's, its reasoning appears to be based on the *dissenting* opinion by Judge Wisdom in *Markwell & Hartz. Compare* 387 F.2d at 84, 89-90 (Wisdom, C.J., dissenting), with 550 F.2d at 315-18 *(Linbeck's* discussion of "Ownership of Materials vital to primary employer's operations"). If that is so, the Fifth Circuit has disregarded its longstanding requirement that decisions of its panels be overruled only by the full Court sitting *en banc. Miller v. San Sebastian Gold Mines, Inc.*, 540 F.2d 807, 810 (5th Cir. 1976); *United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1972).

The decision in *Linbeck*, therefore, is of doubtful validity as expressing the law of the Fifth Circuit.

[39]App. A p. 16.

Electric. At the same time the majority declares: 'We can thus find in *Denver Building* no abiding principle to control this case.' The fact is that the majority has decided a construction common situs case according to the standard of *General Electric* rather than *Denver Building.*

The majority's statement that its standard in this case is far narrower than that of *General Electric* is open to serious question. It may appear at first that the *General Electric* standard of 'work-relatedness' is broader than the NLRB's standard, approved here by the majority, of 'essential to the primary employer's normal operations. But in fact when one applies the majority's 'common sense' notion of *de facto* suppliers to the typical construction site picketing case, there is no substantial difference in result between the two standards. At one point in its opinion the *General Electric* Court phrased its standard in terms of work 'necessary to the normal operations,' thus leaving no vestige of difference in the majority's 'essential to normal operations' standard.

* * *

If *General Electric* is truly not applicable to construction site cases, then we should not now apply a standard based on the reasoning of *General Electric* and other industrial plant cases. To do so, as we have shown, would be contrary to the *Denver Building* precedent. (Footnotes omitted.)[40]

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[40]App. A at pp. 34-36.

It is submitted, as Judge Wilkey concludes, that in using an "essentiality" standard, the majority is *not* applying a "far narrower concept" than the "work-relatedness" test of *General Electric*. This Court defined relatedness in terms of work "necessary to the normal operations" of the primary.[41] There is no difference between work which is "essential" to normal operations and that which is "necessary".

In sum, it is clear that the Court of Appeals extended the *General Electric* work-relatedness test, a test developed for the picketing of industrial plants whose employees are on strike, to purely informational picketing at a construction project, where both the nature of the picketing and the relationship between contractors compel a different balancing of interests. With respect to the latter consideration, the Court of Appeals holding is in conflict with at least two other circuits and is inconsistent with the rationale applied by this Court in *Denver Building Trades*. This Court should grant certiorari to resolve the conflict among circuits and settle the question presented by this Petition.

III

DENIAL OF A WRIT IN THIS CASE MAY PRECLUDE LATER REVIEW OF THE ISSUE

The failure to grant a writ of certiorari here may foreclose the possibility of review of the question presented in a later case.

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[41] *Local 761, International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 366 U.S. 667, 680, 681 (1961).

This proceeding follows review by the Court of Appeals as prescribed in the Act. 29 U.S.C. §160(f). Such a review is available only from a "final order of the Board" resulting from an agency adjudication. *Id.* The Board may adjudicate, however, "only upon the filing of a 'complaint' [based upon an unfair labor practice charge]; and Congress has delegated to the Office of General Counsel on 'behalf of the Board' the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. §153(d); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967)." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). Thus, "[i]n those cases in which [the General Counsel] decides not to issue a complaint, no proceeding before the Board occurs at all." *Id.* at 139. As the Court recognized in *Sears:*

> The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

Id.

The difficulty with this arrangement is that in deciding whether to issue complaints "in the name of the Board," 29 C.F.R. 102.15, the General Counsel follows current Board law, even where it appears to be questionable. *See, e.g., Associated Builders and Contractors, Inc. v. Irving*, 610 F.2d 1221, 1227 (4th Cir. 1979). Where, as here, the Board has determined that a complaint should be dismissed, the General Counsel in

similar future cases will likely decline to issue complaints.[42] There will then be no Board adjudications from which to seek judicial review. Thus, unless this Court grants the instant petition, it may be deprived of an opportunity to consider the question presented.

The question is too important to be committed to an agency prosecutor's unreviewable discretion. The petition should be granted.

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[42]*See Carpenters Union Local No. 1323 (Montseles Associates)*, 4 AMR ¶10,086 (1977), and *Laborers Local Union 300 (AMC)*, 4 AMR ¶10,069 (1976); *see also*, Quarterly Rep. of the General Counsel for Fourth Quarter 1978, NLRB Release R-1572, at 14 (June 15, 1979), all declining to authorize issuance of §8(b)(4) complaints on the basis of *Linbeck*. Indeed, the instant case appears to have arisen from a regional director's inadvertent failure to follow *Linbeck* in declining to issue a complaint.

CONCLUSION

For the reasons set forth herein and for the reasons given by Judge Wilkey in his dissenting opinion in the Court below, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ William R. Radford

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CERTIFICATE OF SERVICE

This is to certify that on the 9th day of January, 1981, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were served on Counsel for Respondents by depositing the same in the United States mail with first class postage prepaid and addressed to: Richard Bader, Esq., National Labor Relations Board, Appellate Branch, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570 and Joseph K. Kaplan, Esq., Kaplan, Sicking, Hessen, Sugarman, Rosenthal & DeCastro, P.O. Drawer 520337, Miami, Florida 33152, Counsel for Intervener, Local Union 323, International Brotherhood of Electrical Workers.

/s/ William R. Radford

Appendix

A. Opinion of the United States Court of Appeals for the District of Columbia Circuit.

B. Decision and Order of the National Labor Relations Board.

C. Administrative Law Judge's Recommended Decision.

D. Statutes.

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1450

J. F. HOFF ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERVENOR

Petition for Review of an Order of the National Labor Relations Board

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Argued April 25, 1980

Decided September 12, 1980

William R. Radford for Petitioner. *Peter J. Hurtgen* also entered an appearance for petitioner.

Richard Bader, Attorney, National Labor Relations Board with whom *Robert E. Allen*, Acting Associate General Counsel and *Elliott Moore*, Deputy Associate General Counsel were on the brief for respondent.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Robert Lewis, *Roger S. Kaplan*, and *Stephen A. Bokat* were on the brief for amicus curiae, Chamber of Commerce of the United States of America, urging the granting of the petition for review and case remand.

Thomas X. Dunn, and *Laurence J. Cohen*, were on the brief for amicus curiae, Building and Construction Trades Department, AFL-CIO, urging denial of the petition for review.

Joseph H. Kaplan was on the brief for Intervenor. *Joseph C. Segor* also entered an appearance for Intervenor.

Before: WRIGHT, *Chief Judge*, WILKEY and WALD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

Dissenting opinion filed by *Circuit Judge* WILKEY.

WALD, *Circuit Judge*: This case poses the problem of whether a "neutral gate," set up by a construction contractor to insulate neutral employers at a common site from the impact of union picketing, lost its protected status when supplies, intended to be used by the primary employer [1] but ordered and owned by the owner of the construction project, were delivered through the gate. The primary employer, J. F. Hoff Electric Company, filed an unfair labor practice charge with the National Labor Relations Board when the Local 323, Int'l Brotherhood of Electrical Workers, picketed the gate, charging that the Union had violated the "secondary picketing" ban of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i) and

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[1] In secondary boycott cases, the "primary employer" is the employer with which the Union is embroiled in a labor dispute.

(ii) (B).[2] The NLRB ruled that the gate had lost its

[2] The statute provides:

> It shall be an unfair labor practice for a labor organization or its agents . . . (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
>
> . . .
>
> *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act:
>
> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the pri-

neutral status, at least temporarily, and dismissed Hoff's unfair labor practice complaint. Hoff has appealed the dismissal. We affirm the Board's action.

FACTS

Hoff, which employs non-union workers, was engaged to install the electrical system on a residential construction project in North Palm Beach, Florida. The project itself was located at the extreme southern end of a site which was more than 1600 feet long. There were only two gates into the project; the "reserved" north gate, at the far end of the site away from the project, which was marked for the use of Hoff's employees, suppliers, and certain other subcontractors, and the "neutral" south gate near the construction project which was used by everyone else connected with the project. During the course of construction, once or twice a week as needed by Hoff but not on any fixed schedule, Consolidated Electric Supply Company delivered electrical fixtures ordered by the project owner to a trailer on the site. Hoff employees picked up the fixtures at the trailer and installed them in the new buildings. Consolidated used the south gate for such deliveries. In November, 1977, the Union began picketing at the north gate publicizing and protesting the fact that Hoff employees were paid less than Union wages. In December, 1977, picketers saw Consolidated delivering electrical fixtures through the south gate and moved their pickets to that gate. They also began picketing along the fence between the south gate and the southernmost boundary of the project. After four days Hoff wrote the Union assuring it that Hoff and its suppliers would henceforth use only the north gate; on its attorney's advice, the Union's pickets thereupon with-

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mary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution [.]

drew from the south gate. They continued to picket in front of the area of construction work, however, several hundred feet away from the south gate.[3]

THE BOARD'S DECISION

The Board adopted the findings of its Administrative Law Judge (ALJ), ruling that the neutrality of the south gate had been breached by delivery of Consolidated's fixtures to be installed by Hoff and thus the Union committed no violation of 8(b)(4) by picketing at that gate. The Board relied on *Int'l Union of Operating Engineers, Local No. 450 (Linbeck Construction Corp.)*, 219 NLRB 997 (1975), *enforced*, 550 F.2d 311 (5th Cir. 1977), for the proposition that "any gate used to deliver materials essential to the primary employer's normal operations is subject to lawful picketing," 550 F.2d at 318.[4] The Board also unanimously found that the picketing along the southernmost end of the project site was lawful and unrelated to any secondary intent, applying the four-prong test set out in *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 NLRB 547

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[3] In January, 1978, a U.S. District Court enjoined all picketing except in the immediate vicinity of the north gate.

[4] Member Murphy dissented as to this aspect of the case. She emphasized the fact that in *Linbeck* the delivery was of crushed stone raw material to be converted by the primary employer into a finished product, while here finished fixtures were delivered which in her view were not "materials used" by the primary employer, or supplies "essential to [its] normal operations." The Board's answer to Member Murphy's dissent was that

> [t]he contention that delivery of electrical fixtures is not "essential" to the operations of an electrical contractor charged as here with installation of an electrical system for a general contractor is a contention that falls of its own weight and the rationale of the Board's decision in *Linbeck* is fully applicable here in dismissing the instant complaint.

(1950), which is used to determine the permissible scope of picketing a site shared by many employers.

The Permissible Scope of Construction Site Picketing

1. *Settled Principles*: It is settled that a union may picket a primary employer with which it has a labor dispute; indeed, such picketing is expressly exempted from the prohibitions contained in section 8(b)(4).[5] The Union may not, however, picket a neutral employer in order to force that employer to cease doing business with the primary employer. Such picketing is "secondary" in that it constitutes an attempt to draw a neutral party into the dispute between the union and the primary employer, a dispute in which the secondary employer has no direct interest, and which it is powerless to resolve. On construction sites, where many subcontractors work side by side and are dependent upon each other, the attempt to reconcile these principles and to accommodate both the legitimate interest of the union in bringing economic pressure to bear on the primary employer through picketing, and the interests of neutral employers who wish not to be involved in the dispute, has proved especially difficult. In an attempt to strike a reasonable balance among the competing interests in this situation, certain rules and practices have been evolved by the Board and approved by the courts. In *Moore Dry Dock*, *supra*, 92 NLRB 547, the Board announced several criteria which, if met, raise a presumption that common situs picketing is directed against the primary and not a secondary employer. Those rules are:

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[5] "*Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]" 29 U.S.C. § 158(b)(4)(ii)(B).

> [P]icketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Id., at 549 (footnotes omitted).

It has also been decided by the Board and the courts that in order to isolate a labor dispute and to minimize disruption of the entire work force in common work situs situations, special gates may be reserved for the subcontractor who is the object of picketing. So long as the employees and suppliers of that subcontractor are limited to that gate, the union may not picket the "neutral gate" used by others not involved in the dispute. A case involving picketing at a plant owned by the primary employer, *Local 761, Int'l Union of Electrical Workers* v. *NLRB (General Electric)*, 366 U.S. 667 (1961), established the legitimacy of a limitation of picketing to specially designated gates used by the primary object of the picketing. At the same time, the Court cautioned against any "mechanically applied" tests that disregard the fundamental criteria: the object of the picketing, if it is to be legitimate, must be limited to disruption of the *primary* employer's business. If, from all the circumstances it can be determined that the object of the picketing is inducement of secondary employees to strike, thus forcing their employer to cease doing business with the primary employer, the picketing is unlawful secondary activity. The Court acknowledged:

> Important as is the distinction between legitimate "primary activity" and banned "secondary activity," it does not present a glaringly bright line. The objectives of any picketing include a desire to

influence others from withholding from the employer their services or trade. "[I]ntended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers." . . . But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer.

However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although "[n]o rigid rule which would make . . . [a] few factors conclusive is contained in or deducible from the statute," . . . "[i]n the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent."

Id. at 673-74 (citations and footnotes omitted). In upholding the struck employer's right to assign a gate to independent contractors not involved in the dispute in order to insulate them from the effects of picketing, the Court was careful to assure the Union that the practice could not be used to keep pickets away from customers or suppliers of the primary employer:

The Union claims that, if the Board's ruling is upheld, employers will be free to erect separate gates for deliveries, customers, and replacement workers which will be immunized from picketing. This fear is baseless. The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnect-

ed to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. On the other hand, if a separate gate were devised for *regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations.*

Id. at 680-81 (emphasis added).[6]

In a second "reserved gate" case, *United Steelworkers of America* v. *NLRB (Carrier Corp.)*, 376 U.S. 492 (1964), the Court found picketing legitimate at a special railroad spur track, owned by and reserved for employees of the neutral railroad to get onto the primary employer's premises to make deliveries and pick up shipments. The determinative fact was not that the gate belonged to a neutral party, the railroad, but that the neutral deliverymen were furnishing routine services essential to the employer's normal operations and so were legitimate objects of the picketing union's appeal. Again the Court emphasized, speaking about *General Electric*:

> The legality of separate gate picketing depended upon the type of work being done by the employees

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[6] Speaking of Sec. 8(b)(4)(A) the Court said:

> Thus the section "left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others. Among these were secondary employees who were customers or suppliers of the primary employer and persons dealing with them . . . so long as the labor organization did not . . . 'induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment' . . . ."

Id. at 672.

> who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed to them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was unfair labor practice.

376 U.S. at 497-98. The Court specifically rejected any rule which would make picketing unlawful at gates used only by delivery personnel as opposed to employees of the primary employer:

> Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at *all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt.* In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of *neutral delivery men furnishing day-to-day service essential to the plant's regular operations.*

376 U.S. at 499 (emphasis added).

Thus, so long as the *Moore Dry Docks* limitations are met, a union may legitimately picket at a common work situs in such a way that all employees, suppliers, and customers of the primary employer are reached by the pickets; neutral employers may insulate themselves from the picketing only if the reserved gate practice is faithfully observed. These principles are not in dispute in this case; since Consolidated concededly used the neutral south primary gate regularly, our analysis would end here were it not for the argument advanced by Hoff that Consolidated was not one of *its* suppliers, but rather a supplier to the project owner who ordered and paid for the fixtures, and thus was in fact simply another subcontractor on the project, making deliveries to the owner,

and properly using the neutral gate. The issue of who must use the reserved gate in order to avoid the legitimate picketing of an assertedly "neutral" gate is the focus of the dispute in this case.

2. *The Legal Ownership Argument*: In *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951), the Supreme Court established the principle that, despite their interdependence, not all subcontractors on a construction project can be considered legitimate objects of picketing when the dispute is with but one of them. The case concerned a strike the avowed object of which was to force a general contractor on a construction project to terminate its contract with a particular nonunion subcontractor. The Court found such a strike to be prohibited under Section 8(b)(4). Rejecting an argument that the mutual reliance of one contractor on all others at a construction site renders the entire project a legitimate object of the union's pressure, the Supreme Court held that the mere fact that each is working on the same project does "not eliminate the status of each as an independent contractor or make the employees of one the employees of the other." *Id.* at 689-90. Hoff argues that here both Consolidated and the project owner were "independent" of it because Hoff neither owned the fixtures nor was contractually bound to supply them, therefore the neutrality of the south gate was not breached and picketing directed to Consolidated's deliveries was unlawful secondary activity.

Hoff's interpretation of *Denver Building* would expand that case far beyond its scope, and would in fact permit a primary employer to largely insulate itself from the economic pressures legitimately exerted by those with whom it has a dispute simply by having another "neutral" contractor on the job accept delivery of, and retain title to, the supplies used by the primary employer. Our reading of *Denver Building* is not so broad. We note that

in its decision, the Supreme Court carefully differentiated the situation involved in another case decided the same day, *NLRB* v. *Int'l Rice Milling Co.*, 341 U.S. 665 (1951), in which union pickets sought to convince a *customer's* employees not to enter the employer's grounds. It appears to us that *Denver Building* was merely clarifying the fact that Section 8(b)(4)'s ban on secondary activity applies between subcontractors or between contractors and subcontractors on the same construction project despite their common employment and the inevitable "relatedness" of each one's work as to the other's. We can thus find in *Denver Building* no abiding principle to control this case. The decision does not answer the question of who is a customer or supplier of a primary employer; it simply held that not all contractors on a construction project can be considered the same employer for the purposes of picketing and strikes.

In this case, in contrast to the facts of *Denver Building* there is not the slightest hint that the pickets tried to induce employees of the other subcontractors working on the project to strike in order to force their employer not to deal with the project owner until he ceased to deal with Hoff. They were simply trying to put a stop to deliveries of electrical supplies to Hoff for its use in its business, in order to disrupt its day-to-day operations, perceiving Consolidated to be a "supplier" and thus a permissible object of the picketers' appeal under established rules. *Steelworkers, supra*, 376 U.S. 492. The picketing stopped when assurances were given that all deliveries of Hoff supplies would be through the reserved gate. Although *Denver Building* stands for the proposition that mere co-existence on a common situs as independent subcontractors for a common contractor does not automatically provide sufficient work relatedness to justify picketing of *all* subcontractors, as agents, employees, or suppliers of the main contractor, it does not deal with the question of the permissible scope of picketing when

one subcontractor delivers goods to a job site to be used solely by another subcontractor who is the primary employer.

In attempting to define the customers and suppliers who must use a reserve gate in order to protect a neutral gate from picketing, we find more guidance in the *General Electric* decision.[7] The Court concluded in that case with the observation:

> . . . if Gate 3-A was in fact used by employees of independent contractors who performed conventional maintenance work *necessary to the normal operations* of General Electric [the primary employer in the labor dispute], the use of the gate would have been a mingled one outside the bar of § 8(b)(4)(A). In short, such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees.

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[7] The dissent contends that two circuits have held that "the *General Electric* standard simply does not apply to construction site picketing cases." Dissent at note 21. We cannot agree with this interpretation of these two cases; they stand for no more than the proposition established in *Denver Building*, that a dispute with the general contractor does not justify picketing of an entire construction project, whether on the theory that all subcontractors are "employees" of the general contractor or on the theory that they are all doing "related work." If the dissent means only to suggest, as do these cases, that the particular "work-relatedness" test developed in *General Electric* for industrial plans when the dispute is with the owner of the plant is not applicable to a situation where the labor dispute is with a single contractor on a construction site, we fully agree; not everyone on the site doing work "related" to Hoff's work need use the reserved gate in order to maintain the integrity of the reserved gate system. This adds nothing to our problem in this case, however, which is identifying the "customers and suppliers" who *are* legitimate objects of the union's appeal.

366 U.S. at 682 (emphasis added).[8]

This is, of course, the reasoning contained in *Linbeck Construction Corp. supra*, 550 F.2d 331, where gravel owned by the general contractor but intended for the use of the primary subcontractor was delivered through a neutral gate, triggering picketing of that gate by the Union. The Board found and the Court of Appeals for the Fifth Circuit agreed that such deliveries—regardless of where legal title to the raw materials lay—were the equivalent of use of the neutral gate by the suppliers of the primary employer, and so justified picketing.

> The question in this case is whether legal ownership by a neutral employer of the materials to be used by the primary employer in its normal course of business removes the delivery of these materials from its traditional role as an activity subject to picketing by those who do demonstrate against the primary employer. . . . [T]he controlling question is not who has title to the goods, but is for whose use they are intended. Thus, any gate used to deliver materials essential to the primary employer's normal operations is subject to lawful picketing.

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[8] The Court added:

> While the record shows some such mingled use, it sheds no light on its extent. It may well turn out to be that the instances of these maintenance tasks were so insubstantial as to be treated by the Board as *de minimis*. We cannot here guess at the quantitative aspect of this problem. It calls for Board determination. For determination of the questions thus raised, the case must be remanded by the Court of Appeals to the Board.

Id. at 682. In this case the use of the neutral gate by Consolidated was not *de minimis*. Although the picketing of the neutral gate began at the first instance that came to the Union's attention, in fact weekly or twice weekly deliveries were being made through that gate. ALJ Findings of Fact, Joint Appendix at 16.

Id. at 317-18. Applying the principles underlying *General Electric* to the question of who is a "supplier" or "customer" to whom the pickets may legitimately appeal, we agree with the Board's rejection of any formalistic notion of legal ownership of materials delivered in favor of a more realistic analysis focusing on the intended use of the supplies. Thus if in fact and practice, Consolidated was delivering supplies which in the normal course of its business Hoff used and installed, Consolidated was a "supplier" of Hoff, no matter where legal title to the supplies might lie, and by using the south gate Consolidated contaminated its neutrality, permitting its picketing by the Union.

This test, while based on the same principles, is not as broad as the *General Electric* "work-relatedness" test developed for industrial plants where the struck employer is the owner of the plant.[9] Practically speaking, all subcontractors on a common construction site are doing "related" work, in that if any one of them were shut down, the project would eventually grind to a halt. If *Denever Building* survived the *General Electric* decision, decided a decade later, the scope of permissible picketing in the construction industry is not so broad. The present status

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[9] Despite the fact that both raise common-situs picketing problems, the dissent draws a strict distinction between industrial plants and construction sites, arguing that the test of legitimate picketing must be different for the two. We are by no means convinced that the differences are so striking in all cases as the dissent would suggest; many industrial plants rely heavily on independent contractors for a variety of tasks. In each case, the question is the same; is the particular party an employee, supplier or customer of the struck employer, and thus a legitimate object of the union's appeal? We can find no justification in the Act or in precedent for carving out special, separate sets of rules and criteria dependent on the nature of the work site rather than on the relationship between the parties. *General Electric* and *Denver Building* need not be "reconciled" in so rigid or arbitrary a fashion.

of the *Denver Building* principles need not be decided by us today, because we conclude that even if *Denver Building* retains its full vitality, the Board's decision in this case is correct. While not all subcontractors on a construction project are a proper object of picketing simply because they are doing related work, neither does *Denver Building* mandate an artificial test to determine who are a primary employer's suppliers and customers, based on contractual ties and legal ownership. "Suppliers" are a legitimate object of the picketer's appeal, and the common sense notion of a supplier is a party which delivers goods for the direct use of the primary employer in the normal course of its business. This is a far narrower concept than the *General Electric* "work relatedness" test, and is fully consistent with *Denver Building*.

An "ownership" or "contractual responsibility" test as urged by Hoff here, would be too narrow, and encroach on the Union's legitimate rights. The Supreme Court has already rejected opportunities to look to legal ownership principles as a guideline to the permissible scope of picketing, in cases where the ownership of the situs of the dispute was urged as a distinguishing factor. In *General Electric*, the Court rejected the notion that ownership of the picketed premises by the primary employer rendered the picketing of the entire premises per se permissible.

> In rejecting the ownership test in situations where two employers were performing work upon a common site, the Board was naturally guided by this Court's opinion in *Rice Milling*, in which we indicated that the location of the picketing at the primary employer's premises was "not necessarily conclusive" of its legality. 341 U.S., at 671. Where the work done by the secondary employees is unrelated to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer.

366 U.S. at 679. And in *Carrier Corp., supra*, 376 U.S. 492, the fact that the railroad spur onto the primary employer's premises was owned by the neutral employer made no difference to the legality of the picketing at that location.[10] We find support in these cases for our conclusion that lack of legal ownership of materials which would otherwise be "supplies" of the primary employer does not affect the legality of picketing at their delivery point.

Finally, a rule which would require the Union to divine the legal complexities of the contractual relationships on a construction site, at the risk of committing an unfair labor practice, would be unfair and unrealistic. Surely the workers on the site and the Union picketers did not know and could not be expected to discriminate as to whether Hoff or the project owner owned the fixtures at the moment they passed through the gate. The picketers only saw Hoff employees pick them up, carry them out to the buildings, and install them. In that sense Consolidated was much more identified with Hoff than would have been suppliers of screws, tape or other material commonly used for a variety of purposes, no matter what their special use by Hoff or whether Hoff had title to them. A union engaged in a dispute with a primary employer has a right to picket to carry its appeal to that employer's "employees," "customers," and "suppliers." The Board's decision to apply a common sense definition to those words is reasonable, and furthers the purposes of the Act.

3. *The "Raw Materials" Argument:* Hoff next argues that even if the *Linbeck* principle were to be approved as a Board standard, this case is distinguishable on at

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[10] *See also Seafarer's Int'l Union* v. *NLRB*, 265 F.2d 585 (D.C. Cir. 1959), where the court refused to find the union in violation of 8(b)(4) for picketing a separately owned drydock where a boat which was the primary object of the strike was moored.

least two grounds. It points out that in *Linbeck*, the deliveries were of crushed stone, raw materials to be used by the primary employer in its job of constructing storm sewers and parking lots. Hoff contends that a ruling by the Board to the effect that electrical fixtures are similarly "supplies" of their installer, and therefore their delivery can be picketed, has broad potential for mischief and will eventually destroy the careful balance of interests in common situs picketing situations. It is argued that while deliveries of wires, screws, or masking tape, the ingredients of electricians' work, might be picketed as "supplies" because they are "raw materials," necessary to an electrician's own work, the finished product, the light fixtures that are installed, are the work product of another independent subcontractor ordered by the owner.

We are not persuaded by Hoff's—or the dissent's—doomsday predictions that our ruling might be susceptible of covering virtually all suppliers or independent contractors in any integrated construction project, with "supplies" including the plaster for the walls or ceilings into which the fixtures are installed or the floors or beams on which the electricians stand to install them. We find it significant that this supplier delivered products used *only* by Hoff, not other subcontractors; therefore any disruption caused if the Union should be successful in its appeal to Consolidated's deliveries would not spread to anyone but the primary employer. The ease with which any impact on the other, neutral subcontractors on the site could be completely avoided, simply by requiring Consolidated to deliver its products through the reserved gate, illustrates the limited intended impact of the Union's action. We need not engage in any sophisticated discussions of more attenuated connections in other cases. We repeat Judge Prettyman's invocation that "[w]e do not intend here to make a ruling

broader than the case before us." *Seafarers Int'l Union* v. *NLRB*, 265 F.2d 585, 590 (D.C. Cir. 1959).

How far beyond these facts the Board's practical approach in defining "supplier" might go, we do not venture. The "for want of a nail, the shoe was lost" line of reasoning takes us too far afield from this case and involves easily distinguishable situations. The facts here are fully consistent with the Board's conclusion that the Union's picketing of the south gate was motivated entirely by a desire to reach the suppliers of Hoff, in order to disrupt Hoff's day-to-day activities through permissible economic pressure. Hoff could not install fixtures if they did not arrive; it is hard to think of a supply more essential to electrical installation work than light fixtures. We thus reject Hoff's contention that the notion of "supplies" is limited to raw materials which will be used by the primary employer.

4. *The "Change in Practice" Argument:* In this case, the ALJ, and subsequently the Board itself, rejected Hoff's final argument that in *Linbeck* the critical fact was that the general contractor had *altered* prior procedures in delivering the supplies, thus evidencing an intent to bypass exposure to legal picketing at the reserved gate.

In *Linbeck*, the primary employer and the "neutral" contractor who received and retained title to the crushed stone had deliberately altered their business practices to attempt to avoid the impact of picketing. Whereas the primary employer had initially ordered and received delivery of the raw materials, when it appeared picketing was imminent, legal title, ordering and delivery were simply shifted to another contractor. Thus if the primary employer were successful in convincing its own employees to cross the picket line and remain on the job, it could continue its day-to-day operations unaffected by the Union's efforts to carry its message to

the public, simply picking up its supplies as it needed them from the other contractor. This would completely eliminate a major element of the Union's right to picket, the right to try to persuade a primary employer's supplier not to deal with it for the duration of the labor dispute. We can see no difference in the impact on the Union's rights between this circumvention being accomplished in a deliberate attempt to diffuse the impact of picketing and its being accomplished by the contractual relationships set up at the beginning of the construction project. In either case, we approve the Board's looking to the realities of the relationships involved rather than to the formalities of legal title.[11] We affirm the Board's conclusion that no unfair labor practice was committed by the Union's picketing of the south gate.

THE SITUS PICKETING

Although the Union had originally picketed only the north gate, after it withdrew its pickets from the south gate, it continued to picket along the fence to the

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[11] It is worth pointing out how narrow is the point of contention between our opinion and the dissent. We both agree that not all contractors working together on a construction site are legitimate objects of a union's appeal when the dispute is with but one of them; we agree that the reserved gate system may be used to isolate a dispute and protect neutral employers; and we agree that the struck employer's employees, customers and suppliers must use the reserved gate in order to maintain the integrity of the system. The only disagreement between us is whether, in making the factual determination of whether a particular party is a "supplier" who must use the reserved gate, the Board is restricted to a mechanical determination of legal title and contractual relations, or whether it may apply a commonsense test focusing on who is actually delivering supplies for the use of the primary employer. We do not believe *Denver Building* mandates the former, and we believe a proper balance of the union's interests against those of the neutral employers on the job site is struck by the latter.

southern edge of the site, nearest the buildings which were under construction. Hoff argues that this indicates that in fact, the Union's intent in moving from the north gate was to enmesh neutral employers in its dispute with Hoff. Hoff contends that since there was a reserved gate, at which the Union's message could be carried to all Hoff employees, there was no need to picket the southern fence in order to accomplish that concededly legitimate end, and thus an improper motive could be inferred. The Board dealt with this allegation by analyzing the propriety of the southern fence picketing on its own merits. Finding the southern picketing entirely lawful under the *Moore Dry Dock* standards, the Board concluded that no unlawful intent could be inferred from it.

There cannot be any serious dispute that picketing the southern fence in fact satisfied the strictures of *Moore Dry Dock*. The picketing only occurred while Hoff employees were working on the new buildings, Hoff's workers were engaged in their normal business of doing electrical work, the picketing disclosed that the dispute was only with Hoff, and, since the project was located at the extreme southern tip of a 1600 foot construction site, picketing outside the fence at that point was clearly "reasonably close" to the situs of the dispute, where the Hoff employees were working.

Hoff is correct in its point that *Moore Dry Dock* is only an evidentiary tool, merely raising a presumption that the picketing is lawful absent affirmative evidence of unlawful secondary intent. Hoff contends that the very existence of a reserved date at which picketing could occur, plus the fact that other workers employed by neutral contractors could presumably also see the pickets, constitutes such evidence. We agree with the Board that this is not necessarily sufficient to rebut the presumption raised by satisfaction of the *Moore Dry*

Dock standards. There is no evidence in the record of any direct appeal to employees of neutral contractors to engage in strikes or concerted activity, in order to force their employers to cease doing business with Hoff. The pickets did not ask other unions to honor their picket line, to cease work, or to ask their employers to bring pressure on Hoff. Rather, the Union simply picketed, with signs indicating that its only dispute was with Hoff, as near as possible to where Hoff's employees were working. Its picketing was clearly targeted at Hoff's employees, and was thus lawful primary picketing.

The Board's dismissal of Hoff's unfair labor practice charges is affirmed.

WILKEY, *Circuit Judge*, dissenting: The majority purports to decide this case on a principle "far narrower" than the *General Electric* work-relatedness standard, and "fully consistent" with the Supreme Court's standard in *Denver Building* for common situs construction picketing.[1] To judge by the majority's legal reasoning in the abstract, one might agree with this characterization and conclude that this decision follows from precedent and marks nothing very significant. But when one looks at the decision in light of the actual nature of independent contractor relationships on a construction site, it becomes apparent that the practical effect of the majority's holding makes serious inroads against the *Denver Building* rule, and worse, that any logical extension of the majority's reasoning to future common situs picketing cases would leave virtually nothing of *Denver Building* at all.

The difficulty in this case arises from the tension between the Supreme Court decisions in *General Electric* and *Denver Building*. The *General Electric* decision affirms the right of unions to picket gates used by customers and suppliers of an industrial plant, on grounds that this constitutes traditional primary picketing activity.[2] *Denver Building*, on the other hand, protects independent contractors at common situs construction projects from picketing by unions with grievances against other contractors working at the same construction site.[3] Our

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[1] Maj. op. at 12.

[2] *Local 761, Int'l Union of Elec. Workers* v. *NLRB* (*General Electric*), 366 U.S. 667, 680-81 (1961). *See* maj. op. at 5.

[3] *NLRB* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 687-90 (1951). *See* maj. op. at 8. *Denver Building* did not involve the use of separate gates for the primary employer and other contractors, as have most subsequent cases in this area. When the construction site has separate gates, the picketing must meet the standards of the *Moore Dry*

problem in the present case is that Consolidated Electric Supply Co. (Consolidated) appears to be both a common situs independent contractor *and* a supplier of Hoff Electric Co. (Hoff), the primary employer against whom the union bears its grievance. Consolidated seems to be an independent contractor within the *Denver Building* rule, because it has a separate arrangement to provide materials to the owner of the construction project on which Hoff works, an arrangement contracted for before Hoff was selected as the electrical subcontractor. On the other hand, Consolidated seems to be a supplier of Hoff within the *General Electric* rule, since the lighting fixtures it provides are installed by Hoff's electricians. As a result of this tension, it is a difficult question whether a union with a grievance against Hoff should be able to picket a separate gate used by Consolidated. I believe that an answer to this question does follow logically from an analysis of Supreme Court precedents in this area; it is an answer contrary to the majority's decision.

The majority resolved the above-described tension by applying a "common sense" definition of supplier: "if in fact and practice, Consolidated was delivering supplies which in the normal course of its business Hoff used and

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Dock case, *Sailors' Union of the Pacific*, 92 N.L.R.B. 547, 549 (1950), *set forth in* maj. op. at 4. As applied in construction industry cases, the *Moore Dry Dock* standards require that the union picket only the gate used by the contractor with whom the union has its primary dispute, and not picket separate gates used by other independent contractors. *See, e.g., Carpenters Local 470* v. *NLRB*, 564 F.2d 1360, 1362 (9th Cir. 1977); *Markwell & Hartz, Inc.* v. *NLRB*, 387 F.2d 79, 81-83, (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968). A failure to meet the standards of *Moore Dry Dock*, through picketing of gates used only by secondary employers, indicates an intent by the union to exert unlawful secondary pressures. *See Carpenters Local 470* v. *NLRB*, 564 F.2d 1360, 1362-63 (9th Cir. 1977).

installed, Consolidated was a 'supplier' of Hoff . . . ." [4] The majority relies for this approach, as did the National Labor Relations Board (NLRB), on the *Linbeck Construction Corp.* case in the Fifth Circuit, which held that "any gate used to deliver materials essential to the primary employer's normal operations is subject to lawful picketing." [5] Under this approach it is easy to argue that Consolidated is a supplier of Hoff, that the *General Electric* rule permits picketing against Consolidated's delivery as traditional primary strike activity, and that Consolidated's claim of independent contractor status under *Denver Building* is unavailing.

This approach poses *two major problems*, however, which come to light only upon a consideration of the customary relationships of contractors at a common situs construction project. *First, far from being a rare or exceptional case, Consolidated's relationship with Hoff*—providing materials to the owner which are essential to Hoff's normal operation and are used and installed by Hoff—*is highly typical of the way business is done on a construction project.* Owners could prefer to order various items themselves for many reasons—perhaps to cut costs, perhaps to ensure that the items suit their personal tastes. In such instances an owner would quite likely contract with an electrical, plumbing, carpentry, or other type of firm to install or assemble the items. Any subcontractor hired to perform a skilled service will work with many items provided to the site by other contractors. The work on any construction site is so interrelated that many independent contractors can be called "suppliers" of other independent contractors.

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[4] Maj. op. at 11.

[5] *Linbeck Constr. Corp.* v. *NLRB*, 550 F.2d 311, 318 (5th Cir. 1977) (affirming 219 N.L.R.B. 997 (1975)). *See* maj. op. at 2-3.

To see the extent of this interrelationship—*and the extent to which the majority would cut into the* Denver Building *rule*—it is instructive to look at an illustration. An earlier construction site picketing case decided by the NLRB set forth the contract arrangements for a typical housing construction project. The NLRB decision lists the following contracts made by the general contractor American Modulars Corp. for the purchase of materials:

1. *Crystal Park Lumber Co., Inc.*
American purchases decks, trusses, roof sheeting, exterior doors, exterior and interior wood trim, and stairs.

2. *United States Steel Homes Division*
American purchases exterior and interior wall panels and soffit.

3. *J. P. Loomis Co.*
American purchases concrete block and concrete window sills.

4. *Akron Sales Co.*
American purchases brick.

5. *Ornamental Iron Works*
American purchases steel I-beams.[6]

The NLRB decision went on to list the general contractor's contracts with other employers to work with the above materials:

1. *W. B. Miller Construction Co.*
   a. Foundation—concrete block walls
   b. Exterior walls—brick
   c. Window sills

2. *Sondles*
   Erects the housing shell using:
   a. Steel I-beams
   b. Decks

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[6] *United Bhd. of Carpenters*, 203 N.L.R.B. 1112, 1115 (1973).

c. Pre-fab walls—wall panels
d. Trusses
e. Roof sheeting
f. Exterior doors and trim

3. *Alside*
Places soffit under eaves.[7]

In this illustration each of the second group of subcontractors used materials provided not by themselves or their direct suppliers, but rather by the general contractor through the contracts listed in the first group. *Any one of the first group of subcontractors could be termed a "supplier" of the second group, yet each is clearly an independent contractor in conventional usage.* There is no indication that this proliferation of independent contractors to supply the general contractor is an attempt to evade potential union picketing; it is simply the natural result when a general contractor hires firms with special skills, but finds it more economical or convenient to procure the materials independently for them to use.

Of course some subcontractors will have materials delivered to them by their suppliers in addition to or instead of using materials provided to the construction site by independent contractors. Such direct suppliers may of course be picketed under the reasoning of *Denver Building*, since they are not independent of the primary employer to whom they deliver. But the present case is far different: Consolidated is clearly independent of Hoff. Consolidated sold electrical fixtures directly to the owner; Hoff had no relationship with consolidated and no direct relationship even with the owner, as Hoff was hired

[7] *Id.*

by the general contractor, and was hired for the purpose of installing the fixtures but not providing them.[8]

The effect of the majority's opinion is to take such independent contractors out of the *Denver Building* rule whenever they can be characterized as "suppliers," and to allow picketing of any service subcontractors to spread to the independent contractors who provide materials that they use. *This aspect of the decision alone creates a major exception to* Denver Building, *but the effect of the majority's opinion does not end here. Under the* General Electric *decision, "customers" are just as vulnerable to this treatment as "suppliers,"* which leads us to the second major problem posed by the majority opinion.

General Electric affirms the right of unions to picket not only suppliers entering the primary employer's site of work, but also customers.[9] Because in the present case the union did not claim the right to picket *customers* of Hoff, this second major problem did not enter directly into the majority's deliberation. But the reasoning of the majority's opinion leaves no logical ground for refusing to allow common situs picketing of consumers as well as suppliers of common situs contractors who become primary objects of picketing. Once again we see the same tension with *Denver Building*, since many independent contractors are, in a "common sense" view, customers of other independent contractors.

On a common situs construction project the extent of common sense customer relationships is just as broad as supplier relationships. The customer of Hoff or any other skilled service subcontractor is the person who receives the services; this would be either the general contractor

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[8] *Local 323, IBEW*, No. 12-CC-1006 (NLRB 3 Apr. 1979), *reprinted in* Appendix at 2, 13-16 (decision of ALJ).

[9] *See Local 761, Int'l Union of Elec. Workers* v. *NLRB* (*General Electric*), 366 U.S. 667, 680 (1961).

or the owner. In the case of subcontractors who provide materials to the general contractor, their customers include not only the general contractor but also the other independent subcontractors that use, install, or assemble the materials.

If a union is allowed to picket all those who by a common sense view fall into the *General Electric* categories of supplier and customer, the union can vastly expand the targets of its picketing. We can trace the effects of the majority's reasoning in terms of our earlier illustration. The majority's holding as to suppliers allows a primary labor dispute with a skilled service contractor in the second group of contracts to spread to the "supplier" contractors in the first group; in similar fashion the majority's reasoning when applied logically to the customer side will allow a primary dispute against a subcontractor in the first group to spread to its customers in the second group.

It is difficult to imagine any relationship between independent contractors that is not either supplier or customer. Any subcontractor who performs skilled services has "suppliers" in those other contractors who provide the materials on which the skilled service contractor performs his work; and he has "customers" in those general contractors who contracted for his services. Any subcontractor who provides materials likewise has "customers" in those subcontractors that use and install the materials, and in those general contractors that ordered and accepted delivery of the materials.

This web of supplier and customer relationships among contractors is precisely what is to be expected, since contractors are admittedly closely interrelated on any typical construction site. Since they are engaged in a common enterprise, the work of any one contractor is related to and often essential for the work of many others. As a result, any judicial approach that rejects the "formalis-

tic" [10] and "artificial" [11] distinctions among construction contractors and adopts instead "common sense" and a "realistic analysis" [12] of the relationships among them, will inevitably conclude, as the majority does here, that the contractors are not truly independent and that one cannot insulate itself from picketing against another. What this approach leaves of *Denver Building* is hard to see.

The majority's approach results from the application of the *General Electric* standard for picketing of suppliers and customers to the situation of a construction project. The natural question to ask, then, is whether *General Electric* and *Denver Building* are simply inconsistent and irreconcilable, so that one decision must necessarily overrule or strictly limit the other. I think they are not, for reasons I will describe.

It is certainly true that the standards of the two cases conflict on the surface. *General Electric* allows picketing of suppliers, customers, and independent contractors performing tasks related to the normal operations of an industrial plant, even when they enter the plant through a separate reserved gate.[13] *Denver Building* deals with construction contractors whose tasks are clearly related to the normal operations of each other, and who under a realistic analysis are *de facto* suppliers and customers of each other in the typical case; yet *Denver Building* allows picketing only against the primary employer with whom the union has its grievance. If the union pickets secondary employers—other contractors entering the site

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[10] Maj. op. at 11.

[11] *Id.* at 12.

[12] *Id.* at 11-12.

[13] *See Local 761, Int'l Union of Elec. Workers* v. *NLRB* (*General Electric*), 366 U.S. 667, 680-81 (1961).

—then *Denver Building* supports the conclusion that an object of the picketing is to induce the secondary employers to cease doing business with the primary, a violation of section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.[14]

In terms of the argument that secondary employers at a construction site are closely interrelated with the primary employer-contractor, *Denver Building does not deny the fact of interrelationship, but concludes that this fact does not eliminate their status as independent contractors:* "The business relationship of independent contractors is too well established in law to be overridden without clear language doing so."[15] It is this acceptance of customary independent contractor relationships, despite the close interrelationship of the contractors, that sets the *Denver Building* standard at odds with the *General Electric* standard.

But whether one of the cases must necessarily overrule the other is a different question. The second of the cases in time, *General Electric*, did not question the vitality of *Denver Building* in any way; its only mention of *Denver*

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[14] 29 U.S.C. § 158(b)(4)(i), (ii)(B) (1976). In separate-gate cases this conclusion is drawn from the combined effect of *Denver Building* and *Moore Dry Dock*, *see* note 3 *supra*. The *Denver Building* case respects the independent nature of the different contractors engaged in a construction project. *See NLRB* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 690 (1951). The *Moore Dry Dock* case prevents the picketing of independent secondary employers at gates not used by the primary employer, because such picketing is not limited in place and time to the activities of the primary employer. *Sailors' Union of the Pacific* (*Moore Dry Dock*), 92 N.L.R.B. 547, 549 (1950). *See Carpenters Local 470* v. *NLRB*, 564 F.2d 1360, 1362-63 (9th Cir. 1977).

[15] *NLRB* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 690-91 (1951).

Building was an approving citation on a collateral point.[16] Faced with this situation, we must give effect to *both* precedents, so long as there is a reasonable way to reconcile them. And in fact there is a way, because each of these cases applies logically to a different category of picketing situations: *Denver Building* pertains to common situs construction projects, while *General Electric* pertains to industrial plants of primary employers.

Lest this appear an arbitrary distinction, *it is important to note the real differences between the two situations. General Electric* protects the traditional right of unions to conduct picketing at a primary employer's industrial plant to influence employees, customers, and suppliers of that primary employer not to do business with him during the strike. In this context it *does* seem "artificial," as a kind of subterfuge, for a struck industrial plant to contract out all its normal operations and have independent contractors enter through separate gates to carry on the operations of the firm unimpeded by the picketers.[17] This means of operation appears artificial and devious because the customary manner of operation for an industrial plant is to carry out its on-site operations with its own employees, not by employing outside contractors.

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[16] *Local 761, Int'l Union of Elec. Workers* v. *NLRB* (*General Electric*), 366 U.S. 667, 672 (1961).

[17] If this were allowed, the strikers would be restricted to picketing the separate gate reserved for the firm's regular employees, none of whom would enter the gate because not only are they on strike, but they have been replaced in their jobs by independent contractors. The right to strike and to picket, in this context, could become almost meaningless. Hence the holding of *General Electric*. The related "ally doctrine" aims to prevent much the same potential evisceration of the right to strike. *See, e.g., NLRB* v. *Business Machine Mechanics Conference Board Local 459*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

On a common situs construction project, on the other hand, the customary practice is entirely different. Owners normally do perform construction operations by hiring outside contractors. General contractors typically engage subcontractors to perform skilled services and provide materials. *It is precisely because these contractor relationships are customary and not anti-strike subterfuges that the* Denver Building *Court could say that they are "too well established in the law to be overridden without clear language doing so."* [18]

Moreover, the common situs construction situation, because it customarily involves many independent employers, requires a delicate balancing of the congressional objective of "shielding unoffending employers and others from pressures in controversies not their own." [19] The unoffending employer's interest appears especially strong in "ambulatory situs" cases such as construction projects.[20] In the industrial site context this interest is less deserving of protection, since contractors who enter a struck plant site to perform normal operations of the plant are in a sense making the plant's controversy their own: customarily they would not be engaged in such

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[18] 341 U.S. at 690. The majority refuses to respect these customary legal relationships among construction contractors when it states that "a rule which would require the Union to divine the legal complexities of the contractual relationships on a construction site, at the risk of committing an unfair labor practice, would be unfair and unrealistic." Maj. op. at 13. Surely it is no more difficult for a union to discern legal relationships among contractors than to discern intended uses of materials and other *de facto* supplier and customer relationships as the majority's standard would require.

[19] *NLRB* v. *Denver Bldg. Trades Council*, 341 U.S. at 692.

[20] *See Local 761, Int'l Union of Elec. Workers* v. *NLRB* (*General Electric*), 366 U.S. 667, 677 (1961).

work but for the need to circumvent the strike. In the construction site context, by contrast, an independent contractor such as Consolidated typically enters its contract with the owner for reasons unrelated to any actual or expected strike.

We thus have ample reason to apply *General Electric* and *Denver Building* each in its own separate sphere, the first for industrial plant picketing, the second for common situs construction picketing. When the cases are reconciled in this manner—and it is very difficult to see any other way to reconcile them—the logical conclusion is that the *General Electric* standard simply does not apply to construction site picketing cases. Both the Sixth Circuit and the Ninth Circuit have arrived at this conclusion, refusing to apply *General Electric* to common situs construction projects.[21] In addition, a Fifth Circuit case has stated that the *General Electric* work-relatedness standard "does not apply to employers at a common construction situs," [22] though that decision contains ambiguities on this point which will be discussed below.

Apparently mindful of the weight of this authority, the majority states that it is applying a "far narrower concept" than the *General Electric* standard, a concept "fully consistent with *Denver Building*." [23] But throughout its opinion the majority relies on reasoning drawn directly from *General Electric*.[24] At the same time the

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[21] *Carpenters Local 470* v. *NLRB*, 564 F.2d 1360, 1362 (9th Cir. 1977); *NLRB* v. *Nashville Bldg. Trades Council*, 383 F.2d 562, 565-66 (6th Cir. 1967).

[22] *Linbeck Constr. Corp.* v. *NLRB*, 550 F.2d 311, 316 (5th Cir. 1977) (citing *Markwell & Hartz, Inc.* v. *NLRB*, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968)).

[23] Maj. op. at 12.

[24] *See* maj. op. at 4, 5, 10, 11, 12, 13. *See also id.* at 6-7 (relying on another industrial plant picketing case, *United Steelworkers* v. *NLRB* (*Carrier Corp.*), 376 U.S. 492 (1964)).

majority declares: "We can thus find in *Denver Building* no abiding principle to control this case." [25] The fact is that the majority has decided a construction common situs case according to the standard of *General Electric* rather than *Denver Building*.

The majority's statement that its standard in this case is far narrower than that of *General Electric* is open to serious question. It may appear at first that the *General Electric* standard of "work-relatedness" is broader than the NLRB's standard, approved here by the majority, of "essential to the primary employer's normal operations." [26] But in fact when one applies the majority's "common sense" notion of *de facto* suppliers to the typical construction site picketing case, there is no substantial difference in result between the two standards. At one point in its opinion the *General Electric* Court phrased its standard in terms of work "necessary to the normal operations," [27] thus leaving no vestige of difference in the majority's "essential to normal operations" standard.

It is true that the "essential to normal operations" language has been endorsed by the Fifth Circuit in *Linbeck Construction Corp.* v. *NLRB*,[28] the same case in which the Fifth Circuit stated that *General Electric* does not apply in the construction site context. In arriving at the "essential to normal operations" standard, however, the *Linbeck* court drew its analysis primarily from *General Electric* and a second industrial plant picketing case.[29] If *General Electric* is truly not applicable to con-

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[25] Maj. op. at 9.

[26] *Id.* at 2.

[27] 366 U.S. at 682.

[28] 550 F.2d 311 (5th Cir. 1977).

[29] *See Linbeck Constr. Corp.* v. *NLRB*, 550 F.2d at 317-18.

struction site cases, then we should not now apply a standard based on the reasoning of *General Electric* and other industrial plant cases.[30] To do so, as we have shown, would be contrary to the *Denver Building* precedent.

To appreciate the tendency of the majority's reasoning to undermine if not overrule *Denver Building*, it is instructive to note the close parallel between the majority's reasoning and that of Justice Douglas in his *Denver Building* dissent. As we have seen, the majority substitutes a common sense, realistic assessment of contractor interrelationships in place of a formalistic distinction among contractors based on factors such as legal ownership.[31] Justice Douglas apparently recognized that

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[30] Nevertheless, the *result* in *Linbeck*, as opposed to the reasoning and "essential" standard, is not necessarily contrary to the analysis presented here. The *Linbeck* case involved a transfer of contractual ownership of goods normally supplied to the subcontractor who was the primary object of the union's grievance. Contracts were revised so that the goods were delivered by contract to the general contractor rather than the subcontractor; this change took place after the general contractor heard rumors of impending strike activity and only four days before the picketing began. *See id.* at 318. Moreover, the goods were raw materials of the sort customarily ordered by the subcontractor and not the general contractor in such situations.

A sham or subterfuge contractor relationship might fall outside the rationale of *Denver Building*, discussed above, which was intended to respect *customary* contractor relationships on a construction site. In the present case there is no need to decide whether a "subterfuge" exception might be appropriate in construction picketing cases, since the contractual relationships on the site where Hoff worked were established well in advance of any picketing threat, even in advance of the selection of Hoff as subcontractor.

[31] *See* maj. op. at 11-12.

this line of reasoning ran directly contrary to the *Denver Building* decision, for he argued in dissent that the Court had made the right to strike "dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned," [32] and that "[t]he presence of a subcontractor does not alter one whit the realities of the situation." [33] It goes without saying that to follow this line of reasoning consistently is to overrule *Denver Building*.[34]

There is one further important argument against nibbling away at the *Denver Building* rule and its respect for customary independent contractor relationships at construction sites. Ever since the Supreme Court's decision in 1951, *Denver Building* has been the object of almost annual attempts by Congress to overrule it legislatively. Courts normally hesitate to reverse a statutory interpretation, since Congress can change it by legislation if it wishes. This reluctance is most fully warranted

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[32] *NLRB* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 693 (1951) (Douglas, J., dissenting).

[33] *Id.*

[34] Despite the broad implications of the majority's reasoning in this case, which would severely limit *Denver Building*, the majority does suggest a much narrower basis on which its opinion might stand. The majority mentions that Consolidated delivered supplies *only* for Hoff, not for the use of other subcontractors. While one might design a new exception to *Denver Building* along these lines, there is no convincing principled reason to do so. Customarily contractors often deliver materials to a construction site for the use of only one skilled service contractor, as can be seen in the illustration on pp. 4-5 *supra*: lumber for carpenters, bricks for masons, etc. If typical construction arrangements often have independent contractors deliver such materials that only one other contractor can use, there is no more reason to deny the independence of this relationship than of any other independent contractor relationship on the site.

when Congress deliberates at length whether to overrule legislatively and decides not to.

Common situs picketing has received ample legislative attention recently. Opponents of *Denver Building* have pressed the argument that "the realities of the situation" show that construction contractors are closely interrelated, and that "fortuitous business arrangements" among contractors should not insulate them from picketing.[35] A common situs picketing bill failed in 1975 for lack of congressional override of a presidential veto.[36] In 1977 a bill containing similar provisions failed to win a majority in the House.[37] The latter bill was intended expressly to apply the reasoning of *General Electric* to common situs construction picketing.[38] I see no reason for this court now to hand to the losers the prize that eluded them in Congress.

The significance of this case might appear less if it were not the third in a series of heretofore unsuccessful attempts by this court to broaden the permissible scope of secondary boycott activity. Because of the fine line between primary and secondary strike activity, all the rules prohibiting secondary boycotts are susceptible to being swallowed by superficially plausible exceptions. In two other controversial areas of secondary boycott activity, this court has shown an inclination to cut back on the protections against secondary boycotts. Two of our en banc decisions of recent years have unsuccessfully attempted to expand the permissible scope of secondary

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[35] *See* S. REP. No. 438, 94th Cong., 1st Sess. 10-11 (1975) (quoting *NLRB* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 693 (1951) (Douglas, J., dissenting)).

[36] H.R. 5900. *See* 121 CONG. REC. 42,015 (1975).

[37] H.R. 4250. *See* CONG. REC. H2517 (daily ed. 23 March 1977).

[38] H. REP. No. 96, 95th Cong., 1st Sess. 6 (1977).

picketing of struck products sold by neutral businesses,[39] and to broaden the extent to which work preservation agreements may justify the exertion of secondary boycott pressures.[40] In both cases a sharply divided en banc Court of Appeals decision was reversed by the Supreme Court.[41] The majority's decision in the present case represents, I believe, yet *one more attempt to expand an exception to the secondary boycott prohibition to the point that the execption overshadows the rule.*

The proper disposition of this case is to hold that the National Labor Relations Board applied an improper standard—a standard contrary to *Denver Building*—when it decided this construction site picketing case according to the reasoning and standards of *General Electric.* The case should be remanded to the Board for consideration under the terms of *Denver Building* and the *Moore Dry Dock* case, rather than *General Electric.* Under the proper standard, the issue for decision would be whether the picketing of the date used by Consolidated was a secondary boycott effort to induce either Consolidated, or the owner of the project, or the general contractor, to cease doing business with Hoff.[42]

Because the majority affirms a Board order decided according to an improper standard, I must dissent.

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[39] *NLRB* v. *Retail Store Employees Union (Safeco)*, No. 76-2015 (D.C. Cir. 10 Aug. 1979) (en banc), *rev'd* 48 U.S.L.W. 4796 (U.S. 20 June 1980).

[40] *Enterprise Ass'n of Steam Pipefitters* v. *NLRB*, 521 F.2d 885 (D.C. Cir. 1975) (en banc), *rev'd*, 429 U.S. 507 (1977).

[41] In a third case along similar lines, involving "hot cargo" and work preservation agreements, a divided panel decision of this court was affirmed this year by a 5-4 Supreme Court decision. *See NLRB* v. *International Longshoremen's Ass'n*, 48 U.S.L.W. 4765 (U.S. 20 June 1980) (affirming 613 F.2d 890 (D.C. Cir. 1979)).

[42] *See* 29 U.S.C. § 158(b)(4) (1976).

APPENDIX B

[APR 5 1979 RECEIVED]

JMT
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North Palm Beach, Fla.

241 NLRB No. 98

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

and

J. F. HOFF ELECTRIC CO.

Case 12 — CC — 1006

DECISION AND ORDER

On July 24, 1978, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and

conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

[1]In finding that the neutrality of the reserved neutral gate had been breached and hence that Respondent Union could lawfully picket that gate, the Administrative Law Judge relied on our decision in *International Union of Operating Engineers, Local Union No. 450, AFL-CIO (Linbeck Construction Corporation)*, 219 NLRB 997 (1975). There, the Board held that a general contractor who acted as a supplier of a struck subcontractor was required to use the same reserved gate as any other supplier of the struck employer even though the general contractor held title to the supplies so delivered. The general contractor's failure in *Linbeck* to do so and its bringing materials in through the supposedly neutral gate tainted that gate and allowed the picketing there. Our dissenting colleague's effort to distinguish *Linbeck* from the instant case, predicated on the contention that the supplies delivered in *Linbeck* through the neutral gate (crushed stone) were "raw material" but the material moved through the neutral gate here (electrical fixtures) is a finished product and, according to our colleague, not "materials used" by Hoff in its work, is patently unsuccessful. As the court of appeals pointed out in enforcing the Board's order in *Linbeck* "any gate used to deliver materials *essential* to the primary employer's normal operations is subject to lawful picketing." (Emphasis supplied.) 550 F.2d 311, 318 (5th Cir. 1977). The contention that delivery of electrical fixtures is not "essential" to the operations of an electrical contractor charged as here with installation of an electrical system for a general contractor is a contention that falls of its own weight and the rationale of the Board's decision in *Linbeck* is fully applicable here in dismissing the instant complaint.

As we agree with the Administrative Law Judge's finding that the neutrality of the reserved gate was breached, and as we agree with his further finding that Respondent's picketing along the southernmost portion of the construction project closest to where the primary employer's employees were working complied with *Moore Dry Dock* standards in a context free of unlawful secondary intent, we find it unnecessary to rely, as the Administrative Law Judge did, on the Board's decision in *Construction, Building Material & Miscellaneous Drivers, Local No. 83, affiliated with*

(Footnote 1 continued)

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. April 3, 1979

Howard Jenkins, Jr., Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

D — 4886

MEMBER MURPHY, dissenting in part and concurring in part:

Contrary to my colleagues and the Administrative Law Judge, I find that the neutrality of the reserved neutral gate was not breached and that Respondent

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(Footnote 1 continued)

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Allied Concrete, Inc.), 231 NLRB 1097 (1977), in determining that such picketing was lawful. *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547 (1950).

Union therefore did violate Section 8(b)(4)(i) and (ii)(B) of the Act by its picketing at that gate.

There is no dispute concerning the cogent facts. They are briefly as follows: Hoff, the Charging Party, was the electrical subcontractor on the construction project in question and became engaged in a primary labor dispute with Respondent. At or before the onset of the dispute, the construction project general contractor established a reserved gate system. The primary (north) gate was reserved for Hoff, its employees, and its suppliers (and for certain other subcontractors who are not involved in this proceeding). The neutral (south) gate was reserved for all others.

Respondent's picketing in support of its dispute with Hoff was initially confined to the area of the primary (north) gate. Then, for a period of approximately 4 or 5 consecutive days, Respondent picketed along the entire western boundary of the project, including both the primary and neutral gates. Thereafter, Respondent withdrew its pickets from the neutral gate itself, but continued to picket for another month at the primary gate, as well as along the southern portion of the western boundary of the project, below the neutral gate, closest to where the Employer's employees were actually working. Finally, Respondent's picketing was limited to the primary gate only, in compliance with an injunction issued pursuant to Section 10(l) of the Act.

Respondent picketed at the neutral gate because it had observed what it believed to be breaches of the neutrality of that gate resulting from the delivery of certain electrical light fixtures to the project site by an

electrical supply company (not Hoff). These deliveries were made approximately once a week, through the neutral gate. The electrical light fixtures in question were ultimately installed by Hoff in the buildings under construction, pursuant to its subcontract with the general contractor. However, these fixtures were selected, ordered, purchased, delivered to, received, and owned not by Hoff, but by the project owner itself. On one occasion, the project owner, having first accepted delivery of a load of these fixtures, requested the supply company to take the fixtures directly to one of the buildings under construction. There, the delivery truck was unloaded by the supply company's driver and the fixtures were carried into the building by men who, in the eyes of a watching picketer, appeared to be electricians. On all other occasions relevant herein, the fixtures were stored on the project premises by the project owner, prior to installation. From time to time, as required, Hoff's employees would remove these fixtures from the project owner's storage area and install them in the buildings. The installation of these fixtures was a very small part of Hoff's subcontract.

Relying on the Board's decision in *International Union of Operating Engineers, Local Union No. 450, AFL-CIO (Linbeck Construction Corporation)*, 219 NLRB 997 (1975), the Administrative Law Judge found, in effect, that the delivery of these electrical fixtures through the neutral gate constituted the delivery of supplies for the use of the primary employer; that, as a result of these deliveries, the neutrality of the neutral gate had been breached; and that Respondent's picketing at the neutral gate was therefore lawful primary activity. I believe that the Administrative Law

Judge's and my colleagues' reliance on *Linbeck* is misplaced.

Linbeck differs significantly from the instant case on the basis of sharp, relevant differences between the basic nature and use of the materials delivered through the neutral gates in the two cases. In *Linbeck,* the primary employer was a subcontractor who was engaged, in part, to construct paved storm sewers and parking lots. Raw material in the form of crushed stone was supplied to the subcontractor, and was delivered to it through a reserved neutral gate. This raw material was used by the subcontractor in its construction and paving work. In other words, it was converted into the final product. Delivery of the crushed stone under those circumstances therefore constituted the delivery of supplies for use by the primary employer. Delivery of those supplies through the neutral gate breached the neutrality of that gate.

In the instant case, however, Hoff was engaged, in part, to install electrical light fixtures. Again, these fixtures were selected, ordered, purchased, delivered to, received, owned, and stored by the project owner itself, *and not Hoff.* They were no more "materials used" by Hoff in its work than Rembrandts and Picassos would be "materials used" by a subcontractor engaged to hang paintings in an art gallery. Rather, the materials essential to Hoff's normal operations were, in the circumstances here, items such as cable, wire nuts, electrical tape, switches, and so forth — but clearly not the electrical lighting fixtures themselves which Hoff was engaged to install. Thus, the delivery of these fixtures to the project owner did not constitute the

delivery of supplies to Hoff; the neutrality of the neutral gate was therefore not breached; and Respondent was thus not privileged to picket at the neutral gate.

In finding to the contrary, my colleagues contend that the delivery of electrical fixtures was "essential" to Hoff's operations in the performance of the subcontract. Had Hoff contracted to *provide* the electrical fixtures, I might agree. But, as seen above, such is not the case here. Rather, the project owner itself undertook the responsibility for providing the electrical fixtures. Thus, the delivery of the fixtures was not "essential" to Hoff's performance, because Hoff was not responsible for providing these fixtures.

My colleagues' contention to the contrary appears to be premised on the tautologous proposition that without electrical fixtures, one cannot install electrical fixtures, and that, therefore, electrical fixtures are essential to the installation of electrical fixtures. This is a nice abstraction, the truth of which cannot be denied in the vacuum in which my colleagues would have it preserved. Their theory of "essentiality" does not, however, survive removal from the vacuum and application to the particular circumstances of this case. That is, my colleagues would no doubt agree that without a building, one cannot install electrical fixtures, and that, therefore, a building is essential to the installation of electrical fixtures. My colleagues would also undoubtedly agree that steel, wood, and plaster board are essential to the construction of apartment buildings such as were being constructed in this case. By logical extension, my colleagues would necessarily contend that, inasmuch as steel, wood, and plaster

board are essential to buildings, and inasmuch as buildings are essential to the installation of electrical fixtures therein, therefore steel, wood, and plaster are essential to the installation of electrical fixtures. But would my colleagues really adopt the absurd, yet inescapable, conclusion of their abstract reasoning as applied to the particulars of this case — i.e., that the delivery of steel, wood, and plaster board through the reserved neutral gate constituted the delivery of materials "essential" to Hoff in performing its task of installing electrical fixtures? I think not. Thus, my colleagues' tautologous proposition (that the electrical fixtures were "essential" to Hoff because without them Hoff could not install them) is, when carried to its logical conclusion in the context of this case, reduced to an absurdity, which if applied to this case would legitimize the Union's picketing at the reserved neutral gate in response to the delivery through that gate of any material essential to the construction of the apartment building itself.[2] To legitimize such picketing would be

[2]Thus, it is evident that words such as "essential" and "normal operations" must be applied in context, lest such words be extended to cover more than their intended use permits. For example, if those terms were literally applied without regard to factual realities, it would presumably be lawful to picket a neutral gate through which paint passes when the primary employer is an interior decorator engaged, in this example, only to *apply* the paint otherwise selected, purchased, delivered to and received by the building owner herself. Despite the limited scope of the interior decorator's particular contract in such an example, the paint would, under the majority's view, be "essential" to the interior decorator's operations. But, of course, in the particular circumstances of the example, the limited extent of the contract would preclude a broad application of the terms "essential" and "normal operations." Accordingly, I can perceive no good reason in the instant case to apply sweepingly such terms as "essential" and "normal operations" to Hoff, engaged as it is here to perform only a

(Footnote 2 continued)

quite simply to defeat the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Building and Construction Trades Council, et al. [Gould & Preisner],* 341 U.S. 675, 692 (1951).

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I do, however, agree with my colleagues and the Administrative Law Judge that Respondent's picketing away from the primary gate, along the southernmost portion of the project site closest to where the Employer's employees were actually working, was lawful.

Preliminarily, I agree that this picketing satisfied the guidelines set out in *Moore Dry Dock, supra,* and was conducted without any unlawful secondary intent

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(Footnote 2 continued)

portion (i.e., installing fixtures) of the services which it is potentially able to perform (i.e., installing and furnishing fixtures). Rather, the terms "essential" and "normal operations" should here apply only to the services which Hoff has in relevant part been engaged to perform — the installation of the fixtures, but not the furnishing of them. However, under the majority's view, it would seem that with respect to the neutral gate question presented here, it is immaterial that Hoff has been engaged actually to do less than that which it potentially could or might do. In any event, I would find that the neutral gate has not been breached by the furnishing of electrical fixtures to the project owner through that gate, and that Respondent therefore violated Sec. 8(b)(4)(i) and (ii)(B) by its picketing thereat.

on the part of Respondent. However, inasmuch as I have found that the neutrality of the neutral gate was not breached, I necessarily find that a system of legitimately maintained reserved gates was in force at the project during the time of Respondent's picketing. Consequently, in finding that Respondent's picketing away from the primary gate was nevertheless ultimately lawful, I rely — unlike my colleagues — on our decision in *Allied Concrete, supra,* where the Board found that ambulatory picketing away from a reserved primary gate but conforming to *Moore Dry Dock* standards was lawful, notwithstanding the fact that the reserved neutral gate had not been breached.[3]

Dated, Washington, D.C. April 3, 1979

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

[3] I affirm my decision in *Allied Concrete.*

APPENDIX C

JD-508-78
North Palm Beach, FL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL UNION 323, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS

and

J. F. HOFF ELECTRIC CO.

Case No. 12-CC-1006

Mark E. Levitt, Esq., of Coral Gables, FL, for the General Counsel.

Joseph H. Kaplan, Esq. (Kaplan, Dorsey, Sicking & Hessing, P.A.) of Miami, FL, for the Respondent.

DECISION

Statement of the Case

MICHAEL O. MILLER, Administrative Law Judge: This case was heard on March 27 and 28, 1978 in Coral Gables, Florida, upon a charge filed on January 9, 1978 by the J.F. Hoff Electric Co. (herein Hoff Electric or the primary employer) and a complaint issued by the Regional Director of the 12th Region of the National Labor Relations Board on January 25, 1978.

The complaint alleges that Local Union 323, International Brotherhood of Electrical Workers (herein Respondent or the Union) violated Sections 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (herein the Act) by its picketing of a construction project known as the Old Port Cove project with an object of forcing or requiring Wadsworth & Sabrice and other persons to cease doing business with Hoff Electric. The Respondent's timely filed answer denied the substantive allegations of the complaint.

Upon the entire record, including the briefs filed by General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of the Employers Involved

Hoff Electric is a Florida corporation based in Tequesta, Florida, and engaged in the building and construction industry as an electrical contractor. Wadsworth & Sabrice is a partnership engaged at West Palm Beach, Florida as a general contractor in the building and construction industry. During the past 12 months, both Hoff Electric and Wadsworth & Sabrice have received at their Florida location goods, materials and supplies valued in excess of $50,000 which were shipped to them directly from points located outside the State of Florida.

The complaint alleges and Respondent admits, that Hoff Electric and Wadsworth & Sabrice are employers and persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The complaint alleges and Respondent admits that Local Union 323, International Brotherhood of Electrical Workers is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

1. Introduction

At the material times herein, Wadsworth & Sabrice has been the general contractor on the Old Port Cove project in North Palm Beach, Florida, constructing residences for Old Port Cove Harbor Village, Limited, the project's owner. Hoff Electric was the electrical subcontractor.

The Old Port Cove project is bounded on the west by a highway, U.S. Route 1, on the north by a group of buildings including residences, stores and offices, with adjacent parking areas, on the south by the Intracoastal Waterway, and on the east by a lagoon. Except at the driveways, the western boundary of the project is bordered by curbs, grass and hedges.

The Union has been engaged in a primary labor dispute with Hoff Electric since approximately November 7, 1977. At no time material herein has the Union had any primary labor dispute with Wadsworth & Sabrice.

At or before the onset of the labor dispute, Wadsworth & Sabrice established a reserved gate system by placing signs restricting the use of the only two entrances to the project which entered from Route 1. At the northern extreme, at an entrance from the highway normally used to enter the shopping area and residences (referred to herein as the north or primary gate), a sign was posted reserving that entrance for Hoff Electric, certain other subcontractors, their employees and suppliers. Approximately 500 feet south of the north gate was a second entrance (referred to herein as the south or neutral gate) into a driveway which was immediately adjacent to the construction site. Use of this south gate was permitted to everyone except Hoff Electric and the other excluded subcontractors. The construction site continued for approximately 800 feet south to the Intracoastal Waterway.

2. The Picketing

On November 7, 1977, the Union began picketing at the Old Port Cove project with signs protesting that Hoff Electric lowered the Union's standards. Until December 28, 1977, the picketing was confined to the north gate. From December 28 and for at least 3 to 4 days, the Union's pickets patrolled the entire western boundary, including walking up to the north and south

edges of the south gate. Thereafter, the pickets patrolled from the primary gate south to a point about 150 feet north of the neutral gate and from a point approximately 150 feet south of the neutral gate to the waterway.[1]

Since approximately the end of January, the Union's picketing has been limited to 25 feet on either side of the north gate, pursuant to a temporary injunction issued by the United States District Court for the Southern District of Florida.

The Union began picketing at the neutral gate on and after December 28 because it had observed what it believed to be violations of the neutrality of that gate by the delivery of electrical fixtures by Consolidated Electric Supply Co. It is undisputed that at least once (and occasionally twice) a week, Consolidated made deliveries of electrical fixtures which were ordered by, and were the property of, the project owners. The deliveries were made through the neutral gate to the construction trailers of the project owner or the general contractor. On one occasion, the Union's picket observed the Consolidated truck make a delivery directly to one of the townhouses under construction. The truck was unloaded by its driver and men who appeared to be electricians carried the materials into the

[1]The foregoing facts are not in dispute. General Counsel further contended that at various times throughout the month of January 1978, the Union's pickets were observed in close proximity to, or directly in front of, the neutral gate. The Union denied picketing at or near the neutral gate in January. Resolution of this issue is not required as it would not affect the legality or illegality of the Union's conduct herein.

building. On all other occasions, Hoff Electric employees secured the fixtures from the owner's trailer. The fixtures were installed in the buildings by Hoff Electric pursuant to its subcontract with Wadsworth & Sabrice. The installation of the fixtures was only a small part of that contract.

B. Conclusions

The provisions of Section 8(b)(4) reflect "the dual congressional objective of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Building and Construction Trades Council,* 341 U.S. 675, 692. Thus, a union is permitted to picket a primary employer with whom it has a labor dispute but runs afoul of Section 8(b)(4) if it pickets a neutral employer with a proscribed object of enmeshing that neutral employer in a controversy not its own. In assessing union picketing activities at a common situs the Board is confronted by the difficult problem that unrestricted union activity would be inconsistent with the neutral employer's intended immunity. Conversely, depriving a union of all opportunity to picket at a common situs might render nugatory its right to bring pressure upon a primary employer.

In order to accommodate these conflicting interests the Board in *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company),* 92 NLRB 547 (1950), evolved criteria to help resolve the question of whether a union has the proscribed motive of enmeshing neutral

employers. The rule as originally stated by the Board is as follows:

> When a secondary employer is harboring the situs of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and situs qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to place reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Compliance with the *Moore Dry Dock* standards raises only the rebuttable presumption that the picketing was not for a proscribed objective. See *General Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 254 (1972); *Local Freight Drivers 209 (Sears Roebuck)*, 224 NLRB 1116 (1976). The Board and courts have uniformly held that picketing violates Section 8(b)(4)(i) and (ii)(B) if any of the requirements of *Moore Dry Dock* are disregarded. However, compliance with the standards does not immunize a union's picketing, for a union may, by its other conduct, reveal a secondary

objective. (See generally, *General Teamsters Local 126, supra,* at 254 and 255.)

Further, in order to insulate neutral employers, their employees and suppliers from disputes not their own, employers upon a common situs are permitted to establish and maintain separate gates for use by those primarily involved in a labor dispute and those not so involved. *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B. (General Electric Company),* 366 U.S. 667 (1961). Where such gates are properly established, a union may picket only at the gate of the employer with whom it has a dispute.

General Counsel contended that such a reserve gate was established herein and that by its picketing of that gate, Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act. Respondent asserts that the integrity of that gate was violated by the delivery of electrical fixtures to Hoff Electric through the neutral gate, thus permitting it to picket at that gate. I find Respondent's argument persuasive.

Resolution of the issue herein is controlled by the Board's decision in *International Union of Operating Engineers, Local Union No. 450, AFL-CIO (Linbeck Construction Corporation),* 219 NLRB 997 (1975). Therein, materials intended for the use of the primary employer (Luckie) but owned by the general contractor (Linbeck) were brought on to the site through the supposedly neutral gate. Respondent, there as here, contended that as the materials entering through that gate were the property of a neutral employer, although intended for use by the primary, no breach of the neutral

gate had occurred. The Board rejected this argument, holding:

> We agree with the Administrative Law Judge that Respondent's picketing near the Linbeck gate from June 24 through June 26, 1974, did not violate Section 8(b)(4)(i) and (ii)(B) of the Act inasmuch as there was evidence that Linbeck was bringing in materials through the Linbeck gate for Luckie's use during this period. In our view, it makes no difference that Linbeck was the legal owner of these materials. What is important is that, in bringing in such materials, Linbeck was acting as a supplier of Luckie and therefore was required to use the same reserve gate as any other supplier of Luckie — that which had been set aside and reserved for Luckie. By failing to do so and by delivering the materials instead through the Linbeck gate, Linbeck subjected itself to the same pressures by the Union that the Union could use against any supplier of the primary.

The Court of Appeals, in enforcing the Board's decision in *Linbeck,* stated:

> . . . the controlling question is not who has title to the goods, but is for whose use they are intended. Thus, any gate used to deliver materials essential to the primary employer's normal operations is subject to lawful picketing.

Linbeck Construction Corp. v. N.L.R.B., 550 F.2d 311, 318 (C.A. 5, 1977).

General Counsel would distinguish *Linbeck* from the instant case on the basis that in *Linbeck,* the parties changed their procedures in anticipation of the picketing. They placed title to the materials in the neutral whereas those materials had previously been owned and signed for by the primary; in the instant case, however, title to the fixtures had always been held by the project owner. This, I find, is a distinction without a meaningful difference. Indeed, while the court, but not the Board, pointed this change out in reaching its decision, it also stated that if it were to accept the Respondent's reasoning in *Linbeck,* "general contractors throughout the construction industry could stop a 'traditional goal of primary pressure' — halting the operations of the primary employer through the influence of a picket line on those suppliers who contribute thereto — *by the simple expedient of retaining legal title to all materials* used by the subcontractors." (Emphasis supplied) 350 F.2d at 318. This language clearly demonstrates that the court was not concerned with whether the general contractor *retained* title to the materials at all times or merely *acquired* title in anticipation of the labor dispute.

General Counsel further contended that Consolidated's deliveries through the supposedly neutral gate were so few, and the installation of the fixtures such a small part of Hoff Electric's contract, that the violations of the gate were *de minimus.* Noting that these deliveries were a regular occurrence throughout the period, that Consolidated's use of the gate was not according to any known schedule, and that the installation of these fixtures was a normal and essential part of Hoff's work on the site, I must reject this argument.

Finally, General Counsel contended that the Union's picketing south of the neutral gate to the Intracoastal Waterway failed to comply with the third condition of *Moore Dry Dock*, i.e., that the picketing be limited to a place reasonably close to the location of the situs, inasmuch as there was a gate reserved for the use of the primary. Any picketing at points other than that gate, it argued, was not reasonably close to the location of the situs. Noting, however, that the perimeter of the property south of the allegedly neutral gate was the area closest to where Hoff Electric's employees performed their duties, (see *Teamsters Local 83, (Allied Concrete)*, 231 NLRB 181 (1977), and noting particularly the regular breaches of the neutrality of the south gate by Hoff Electric's supplier, I find that this picketing met the *Moore Dry Dock* standards.[2] I further find that on the record before me there was insufficient evidence to establish that by this picketing, the Union sought to enmesh neutral employers in its dispute with Hoff Electric.

In view of the foregoing, I find that Respondent Union was engaged in lawful primary picketing and did not violate Section 8(b)(4)(i) and (ii)(B) of the Act. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

Conclusions of Law

1. Hoff Electric and Wadsworth & Sabrice are both employers and persons engaged in commerce or in

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[2]There was no contention that the picketing failed to meet any of the remaining criteria.

an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union 323, International Brotherhood of Electrical Workers, is a labor organization within the meaning of Section 2(5) of the Act.

3. Local Union 323, International Brotherhood of Electrical Workers did not commit unfair labor practices as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[3]

ORDER

The complaint herein is dismissed in its entirety. Dated, Washington, D.C. July 24, 1978

/s/ Michael O. Miller
Michael O. Miller
Administrative Law Judge

[3]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX D

Section 8(b)(4), 29 U.S.C. §158(b)(4)

It shall be an unfair labor practice for a labor organization or its agents . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor

organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

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No. 80-1173

in the Supreme Court of the United States

October Term, 1980

J.F. HOFF ELECTRIC COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that the Union did not violate Section 8(b)(4)(B) of the National Labor Relations Act by picketing at a common construction site gate through which supplies were delivered for the sole use of the employer with which the Union had a primary labor dispute.

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OPINIONS BELOW

The opinion of the Court of Appeals, reproduced in the Petitioner's Appendix at pages 1-39 is not yet reported. The decision of the National Labor Relations Board is reported at 241 NLRB No. 98 and is found in Petitioner's Appendix at pages 40-61.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1980. On December 1, 1980, Chief Justice Warren F. Burger extended the time within which to file a petition for a writ of certiorari to and including January 12, 1981. The petition was filed on January 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Federal Statute involved is the National Labor Relations Act, Section 8(b)(4), 29 U.S.C. §158(b)(4), and appears in the Petitioner's Appendix at pages 62-64.

STATEMENT

The Respondent adopts and incorporates herein by reference the Statement of this case as set forth by the National Labor Relations Board in its Brief in Opposition of February, 1981.

ARGUMENT

The Intervenor accepts the position and argument of the National Labor Relations Board in opposition to review of this case. Additionally, Respondent takes this opportunity to address the question presented by the Petitioner concerning the application and interpretation of the major judicial decisions governing construction site picketing. Respondent will show that the neutrality of construction contractors, pronounced in *Denver Building Trades*, applies exclusively to those employers and employees who share the common construction site as their business location. The status of suppliers is markedly different, and their protection from secondary boycott effects is determined in line with the *General Electric* and *Carrier Corporation* decisions. As discussed below, the decision of the Court of Appeals is fully consistent with these landmark cases. Moreover, the ruling in this case is not in conflict with any other circuits.

I. A SUPPLIER TO A CONSTRUCTION SITE EMPLOYER IS NOT AN INDEPENDENT CONTRACTOR WITHIN THE MEANING OF *DENVER BUILDING TRADES*

The decision of the Court of Appeals has correctly resolved the narrow issue in this case by applying settled principles approved by this Court. Contrary to the Petitioner's dire predictions, there is no precedent here that modifies or in any way contradicts previous rulings of this Court or of the Court of Appeals.

Petitioner's main contention, that the Court of Appeals circumvented the meaning of *Denver Building*

Trades,[1] is drawn from the suppositions of Judge Wilkey in dissent:

> Consolidated seems to be an independent contractor within the *Denver Building* rule, because it has a separate arrangement to provide materials to the owner of the construction project on which Hoff works, an arrangement contracted for before Hoff was selected as the electrical subcontractor. On the other hand, Consolidated seems to be a supplier of Hoff within the *General Electric* rule, since the lighting fixtures it provides are installed by Hoff's electricians.[2]

The statement that "Consolidated seems to be an independent contractor within the *Denver Building* rule" is unfounded. Yet, it is the heart of Petitioner's argument before this Court that the Court of Appeals should have looked to *Denver Building Trades* in resolving its quest as to who is a supplier or customer of a picketed primary construction contractor.[3] In fact, the District of Columbia Court of Appeals looked to *Denver Building Trades* but found no guidance:

> We can thus find in *Denver Building* no abiding principle to control this case. The decision does not answer the question of who is a

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[1]*NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951).

[2]Pet. App. 24.

[3]Pet. 14.

customer or supplier of a primary employer; it simply held that not all contractors on a construction project can be considered the same employer for the purposes of picketing and strikes.

* * *

. . . Although *Denver Building* stands for the proposition that mere co-existence on a common situs as independent subcontractors for a common contractor does not automatically provide sufficient work relatedness to justify picketing of *all* subcontractors, as agents, employees, or suppliers of the main contractor, it does not deal with the question of the permissible scope of picketing when one subcontractor delivers goods to a job site to be used solely by another subcontractor who is the primary employer.[4]

The Court of Appeals properly disavowed the notion that "suppliers" or "customers" constitute independent contractors merely because they deliver supplies to a job situs with construction contractors. Typically, at a construction site the primary employer performs distinct work and has a separate complement of employees working in close proximity to neutral employees of other construction contractors. This can be termed the "horizontal" organization of employers at a job site, including all contractors whose work or business is at the job site. *Denver Building Trades* accords these construction contractors and their employees the protection of neutrality in the event a labor dispute

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[4]Pet. App. 12-13 (original emphasis).

involves another contractor. The fact that subcontractors work side by side and are ultimately dependent on one another "does not eliminate the status of each as independent contractors or make the employees of one the employees of the other".[5] It is not disputed that a union which has a dispute with a non-union contractor violates Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. §158(b)(4), if it pickets employees or suppliers of another construction contractor.

However, in addition to the integrated, horizontal work structure which was the subject of *Denver Building Trades*, there are "vertical" lines of operation to each contractor at the common construction site. Suppliers and delivery companies, each with their own work force, provide certain materials and products to be used by particular contractors. Also, there may be several customers, such as the owner or developer which is the customer of the general contractor.

This is, in simple format, the scheme of operations at construction sites, with various subcontractors working together, each using the materials of its craft, which materials are provided by the contractor's supplier. This vertical or supply structure was not addressed by *Denver Building Trades.*

In the view of the Petitioner, outside suppliers and customers approaching or entering upon the common situs are forever insulated as independent contractors, regardless of whether they make deliveries to, or contract for purchases with, the primary employer. There is not

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[5]*NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 689.

even a passing phrase in *Denver Building Trades* to support this enlarged ban on primary activity. In that case this Court reserved the protection for neutral employers to on-site construction contractors and, by reference to *NLRB v. International Rice Milling Co.*,[6] drew the line at suppliers and customers:

> The conduct which the Board here condemned is readily distinguishable from that which it declined to condemn in the *Rice Milling* case *ante*, page 665. There, the accused union sought merely to obtain its own recognition by the operator of a mill, and the union's pickets near the mill sought to influence two employees of a customer of the mill not to cross the picket line. In that case we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike. The union did not engage in a strike against a customer. It did encourage concerted action by the customer's employees to force the customer to boycott the mill. It did not commit any unfair labor practice proscribed by §8(b)(4).[7]

The NLRB and the courts have uniformly applied *Denver Building Trades* to construction contractors whose business is performed at the common situs, and

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[6] *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

[7] *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 687-88.

not to customers or suppliers.[8] In *Building and Construction Trades Council of New Orleans (Markwell & Hartz, Inc.)*[9] the Board confirmed the view that various construction contractors on a common situs, involved in a common enterprise, were independent neutral employers for the purposes of Section 8(b)(4) of the Act. However, the Board also noted the special case of suppliers and deliverymen:

> We do not regard, as unlawful, Respondent's picketing prior to November 16, as it was on that date that the respective neutral gates were first marked to preclude use by persons making deliveries to M & H. Although a common situs problem is presented where a gate is reserved for both neutral subcontractors and persons making deliveries to a construction subcontractor, a balance of the competing interests underlying §8(b)(4)(B) requires our respecting the traditional right of labor organizations to appeal to such deliverymen as a lawful incident of legitimate strike action against the primary employer. [Retail Fruit and Vegetable Clerks Union] (Crystal Palace Market), 116 NLRB 856 [enf. 249 F.2d 591, (CA 9 1957)][10]

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[8] *Local 55 (PMB)*, 108 NLRB 363, enf. 218 F.2d 226 (CA 10 1954); *Hermandad de Trabajadores de la Construction (Levitt Corp.)*, 127 NLRB 900 (1960); *Local 978, Carpenters v. Markwell*, 305 F.2d 38 (CA 8, 1962); and *T. W. Hegelson, Inc. v. Ironworkers*, 548 F.2d 175 (CA 7, 1977).

[9] *Building and Construction Trades Council of New Orleans (Markwell & Hartz, Inc.)*, 155 NLRB 319 (1965), enf. 387 F.2d 79 (5th Cir. 1967), cert. den. 391 U.S. 914 (1968).

[10] *Id.*, p. 499 (emphasis added).

In *Local 978, Carpenters v. Markwell*,[11] the union's picket line was honored by employees of various suppliers and consequently deliveries to the primary employer ceased. The struck employer relied principally on *Denver Building Trades* to claim that its suppliers were protected as neutral employers. However, the Court of Appeals rejected the theory that because the supplier made deliveries to a common situs shared by construction contractors that the supplier thereby became a common situs neutral employer. The critical factor is not the picketing of the supplier at the point of delivery or entrance to the construction site, but whether the picketing extends past the delivery of supplies at the job site so as to put pressure on the supplier beyond its relationship with the primary employer. The Court held that the job site picketing of the supplier was a traditional primary appeal to suppliers of the primary employer:

> In our view, *Labor Board v. Rice Millng Co., supra*, 341 U.S. 665, is persuasive authority for the conclusion that defendants did not engage in secondary activities. We recognize that in *Rice Milling* the Supreme Court emphasized that the union did not engage in *concerted* activities; nevertheless, the situs of the picketing was not ignored. Thus, the Court stated, 341 U.S. at p. 671:
>
> 'There was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread than that already described. There

[11] *Local 978, Carpenters v. Markwell*, 305 F.2d 38 (CA 8, 1962).

were no inducements or encouragements applied elsewhere than on the picket line . . .'[12]

In this case, the Board and the Court of Appeals determined, as a practical matter, that Consolidated Electric Supply Company was a supplier of Hoff Electric and not an independent contractor within the meaning of *Denver Building Trades.* To hold otherwise, that is, to advance Petitioner's argument, would outlaw a union's traditional right to appeal to suppliers and deliverymen to honor a strike or picket line against the primary employer.

In *United Steelworkers v. NLRB (Carrier Corp.)*[13] this Court soundly rejected such a prohibition on primary activity:

> The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserves the right to strike; it also saves 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is *selling,*

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[12]*Id.*, p. 45 (original emphasis).

[13]*United Steelworkers v. NLRB (Carrier Corporation)*, 376 U.S. 492 (1964).

delivering or otherwise contributing to the operation which the strike is endeavoring to halt.[14]

Real differences between suppliers and contractors do not allow them to be grouped together as neutral independent contractors. Any work performed by a deliveryman at the construction site is only the final act of delivery. The final delivery of supplies is a small portion of the supplier's business which is based off the construction site. The likely effect of picketing at the delivery point is only to turn away the driver while allowing the off-site, that is "home site", of the supplier to continue in operation. The business of a construction contractor, on the other hand, is on the common situs. An appeal to his employees could shut down the contractor's entire operation. Despite the proximity and work interrelatedness of crafts at a construction project, the different subcontractors are not, in the normal usage, "selling, delivering, or otherwise contributing to the operation which the strike is endeavoring to halt".[15] The employees of a primary employer, its suppliers and customers, have a more vital and direct association with the primary employer. Indeed, the contribution of labor, supplies and sales to customers is the daily subsistence of the primary employer's business.

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[14] *Id.*, p. 499 (emphasis added).

[15] *Id.*

II. THE COURT OF APPEALS DID NOT APPLY THE "WORK RELATEDNESS" TEST FROM *GENERAL ELECTRIC* TO IDENTIFY WHO IS A SUPPLIER BUT FOLLOWED "THE INTENDED USE" STANDARD DERIVED FROM *CARRIER CORPORATION*

The discussion raised by the Petitioner as to the applicability of the *General Electric* "work relatedness" test[16] to construction sites is distantly removed from the facts and issues of this case. The Court of Appeals in this case neither employed, nor relied upon, the *General Electric* "work relatedness" test. The union's picketing appeal to Consolidated was found to be protected because Consolidated was identified as a supplier of Hoff, the primary employer. The lower court adopted the principle of *Carrier Corporation* that picketing "aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to" the operations of the primary employer is traditional, protected activity. In contrast, the "work relatedness" test is applied to independent, on-site, contractors who

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[16]In *General Electric*, the legality of picketing appeals to neutral on-site employees at a reserve gate rested upon whether the neutrals alone used the gate and, if so, whether they were employed in operations related to the normal business operations of the struck primary employer (e.g., maintenance services) or whether the neutral employees performed functions not related to the everyday operations of the primary employer (e.g., construction or capital improvements). Picketing at a reserve gate is unlawful when the gate is only used by neutral employees whose duties on the job site are not related to the normal operations of the primary employer. This test is used for neutral employers on the common situs. *See McLeod v. Local 459, IUE*, 338 F.Supp. 1051 (SDNY 1972).

share a common situs. Since Consolidated was never entitled to the independent neutral status of an on-site contractor, it is difficult to follow Petitioner's argument that the Court of Appeals stripped Consolidated of its *Denver Building Trades* neutrality by applying a "work relatedness" standard.

Except for vague, semantic similarities to the "work relatedness" concept, there is no indication in the lower court's decision that it applied a "work relatedness" test in determining the relationship between Consolidated Supply and Hoff Electric. Rather, the lower court favored the realistic approach used in *General Electric* and *Carrier Corporation* to identify the customers or suppliers who are legitimate objects of the union's appeal:

> Applying the principles underlying *General Electric* to the question of who is a 'supplier' or 'customer' to whom the pickets may legitimately appeal, we agree with the Board's rejection of any formalistic notion of legal ownership of materials delivered in favor of a more realistic analysis founded on the intended use of the supplies. Thus, if in fact and practice, Consolidated was delivering supplies which in the normal course of its business Hoff used and installed, Consolidated was a 'supplier' of Hoff, no matter where the legal title to the supplies might lie . . .[17]

The common sense, or empirical, definition of "supplier" is one that the participants (the primary and secondary employers and employees) readily observe

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[17]Pet. App. 15.

and use, whereas, the fact of legal title is not cognizable to those at the situs. In support of this realistic and proven approach the Court of Appeals cited *Carrier Corporation; Seafarer's International Union v. NLRB*, 265 F.2d 585 (D.C. Cir. 1959), and most on point, *Linbeck Construction Corp. v. NLRB*, 550 F.2d 311 (5th Cir. 1977). These cases eschew the significance of ownership for a variety of reasons fundamental to labor relations.

The dispositive issue of law in this case is whether at a construction site with a reserved gate system, any gate used for the delivery of materials and supplies for the use of the primary employer in its normal operations is subject to lawful picketing. The answer is well settled and is not in dispute here. *General Electric* is clear on the point that separate gates may not be used to insulate regular deliveries:

> . . . if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks are the employer's everyday operations.[18]

The principles which govern the operation of a "reserve gate" system have routinely been applied to

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[18]*Local 761, International Union of Electrical Workers v. N.L.R.B.*, 371 U.S. 667, 681 (1961).

suppliers of construction sites as well as to industrial plants.[19]

In *Carrier Corporation*, this Court reaffirmed *General Electric* and clarified its holding by concluding that ownership of the situs where the picketing occurs is not relevant to the legality of the picketing at a reserved gate.[20] In *Linbeck Construction Corp. v. N.L.R.B.*, the Fifth Circuit, following the same principle, rejected the contention that supplies owned by a third party, but destined for use by the primary employer, could be sheltered from picketing appeals. The Court stated:

> . . . (G)eneral contractors throughout the construction industry could stop a 'traditional goal of primary pressure' — halting the operations of the primary employer through the influence of a picket line on those suppliers who contribute thereto — by the simple expedient of retaining legal title to all materials to be used by the subcontractors.[21]

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[19]*District Council of Painters v. N.L.R.B. (Calhoun Drywall Co.)*, 361 F.2d 70 (D.C. Cir. 1966); *N.L.R.B. v. Nashville Building and Construction Trades Council*, 383 F.2d 562 (6th Cir. 1967); *Local 369, I.B.E.W. (Kelley Electric Co.)*, 216 N.L.R.B. No. 25 (1975), enf. 528 F.2d 317 (CA 6, 1976); *Iron Workers, Local 433 v. N.L.R.B. (R.F. Erection)*, 598 F.2d 1154 (9th Cir. 1979) (see cases cited therein at Part I).

[20]*Steelworkers v. N.L.R.B. (Carrier Corp.)*, 376 U.S. 492, 499 (1964).

[21]*Linbeck Construction Corp. v. N.L.R.B.*, 550 F.2d 311, 318 (5th Cir. 1977).

Thus, the appellate court's consideration in this case whether the materials were "essential to the primary employer's normal operations",[22] borrowed from the Fifth Circuit's analysis in *Linbeck Construction Corp.*,[23] relates to the supplier issue in a case where legal title or other factors may be distorted, and does not relate to the primary-secondary employer issue addressed by this Court's decision in *General Electric.* In sum, the *General Electric* test of work relatedness between employers is not at issue here since Consolidated's relationship with Hoff was vertical, not horizontal.

This approach is consistent with the traditional right of employees to appeal to suppliers not to deliver materials or goods to an employer engaged in a primary labor dispute. Clearly, the question of who is the supplier remains within the province and expertise of the Board. In this respect *Denver Building Trades* held:

> Not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight.[24]

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[22]Pet. App. 14.

[23]*Linbeck Construction Corp. v. N.L.R.B.*, 550 F.2d 311, 317-318 (5th Cir. 1977).

[24]*N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692.

III. THIS CASE DOES NOT CONFLICT WITH ANY OTHER DECISIONS

The decision of the Court of Appeals in this case does not conflict with the decisions of the Sixth Circuit[25] or the Ninth Circuit[26] as suggested by Petitioner.

Respondent does not dispute, for purposes of this appeal, Petitioner's claim that the *General Electric* "work relatedness" test is broader than the independent contractor test of *Denver Building Trades*, and the former test may be inappropriate in the context of contractors on construction job sites. But, in this case, where the supplies were purchased by the owner-developer to be installed by Hoff, *Denver Building Trades* is not controlling, and other cases, including the *General Electric* case, are helpful in determining the vertical relationship between the supplier and the primary employer.

Since *Denver Building Trades* does not speak to the vertical supply relationship, there is no inherent conflict in deciding supplier relationships in a manner that is uniform and consistent between both industrial and construction job sites.

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[25] *N.L.R.B. v. Nashville Building and Construction Trades Council*, 383 F.2d 562 (6th Cir. 1967).

[26] *Carpenters Local 470 v. N.L.R.B. (Mueller-Anderson, Inc.)*, 564 F.2d 1360 (9th Cir. 1977).

CONCLUSION

There are no issues in this case which have not been resolved pursuant to the guidelines and principles set forth in previous rulings by this Court. The supposed tension between *Denver Building Trades* and *General Electric* is non-existent, and does not arise from the facts of this case involving issues of supplier/deliverymen. As such, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March, 1981

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of March, 1981, three (3) true and correct copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were served by depositing same in the United States mail with first class postage prepaid and addressed to: William R. Radford, Esq., Seyfarth, Shaw, Fairweather & Geraldson, One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131, and Wade H. McCree, Jr., Esq., Solicitor General, Department of Justice, Tenth and Constitution Avenue, N.W., Washington, D.C.

STEVEN BLOOM

No. 80-1173

In the Supreme Court of the United States

OCTOBER TERM, 1980

J.F. HOFF ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OF ELECTRICAL WORKERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board properly found that the Union did not violate Section 8(b)(4)(B) of the National Labor Relations Act by picketing at a common construction site gate through which supplies were delivered for the sole use of the employer with which the Union had a primary labor dispute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-39) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. 40-61) are reported at 241 N.L.R.B. No. 98.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. On December 1, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 12, 1981. The petition was filed on January 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 62-64.

STATEMENT

1. Petitioner Hoff is an electrical subcontractor employing non-union workers, who was engaged to install the complete electrical system for a residential construction project in North Palm Beach, Florida. The project itself was located at the extreme southern end of a site that was more than 1600 feet long. The only access to the project was through two entrances from a highway that ran along the western boundary of the site. The north or "reserved" gate, at the far end of the site away from the project, was designated for the use of Hoff, several other subcontractors, and their employees and suppliers. The south or "neutral" gate, situated approximately 500 feet south of the north gate and near the construction project, was designated for use by everyone else connected with the project. (Pet. App. 4, 52-53; A. 110-112, 215-218, 227-228.)[1]

---

[1] "A." refers to the appendix to the briefs in the court below.

Consolidated Electric Supply Company was the supplier of the lighting fixtures which constituted one component of the electrical system Hoff had contracted to install throughout the project. Consolidated regularly delivered fixtures to the project site once or twice a week, always through the south gate. During November and December of 1977 and January of 1978, the Consolidated driver normally left the boxes of fixtures at the project owner's trailer on the site. (Pet. App. 4, 54; A. 96-99, 128-129, 161-162, 187-188.) When Hoff was ready to install the fixtures, its foreman would go to the project owner's trailer, open the boxes, check the fixtures for breakage, take the fixture components he was ready to install to the construction project, and repack the other items into boxes for storage (Pet. App. 4, 55; A. 95-97, 102, 129, 135-140). On at least one occasion, however, the Consolidated driver delivered fixtures directly to the construction project, where Hoff's employees unloaded them from the truck (Pet. App. 54-55; A. 100-101, 163-164, 191-197). Although the project owner's representative on the project site ordered and paid for the fixtures, she consulted with Hoff's foreman in scheduling deliveries so the fixtures would be there when Hoff needed them (Pet. App. 4; A. 96, 115).[2]

On November 7, 1977, the respondent Union began picketing in the vicinity of the north gate with signs protesting the fact that the wages paid Hoff's employees did not meet union standards (Pet. App. 4, 53; A. 31, 53, 74-76, 166, 185). This picketing continued without incident into December. Sometime in the middle of December, after the pickets

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[2]On February 7, 1978, a few days after the Union's picketing near the south gate was enjoined (*infra*, page 3), the project owner's trailer was moved to another location and shortly thereafter Hoff brought a trailer of its own onto the project site. From then on, although the project owner's representative continued to order the fixtures, Consolidated delivered the fixtures directly to Hoff's own trailer, where Hoff's foreman checked and initialed the invoices. (A. 93, 134-135, 142-144.)

observed one of Hoff's trucks enter the project through the south gate, the Union's business manager told them to watch for further use of the south gate by Hoff or its suppliers. (A. 156-157, 174-175, 178-179, 204-205.) About a week later, the pickets observed a Consolidated truck enter the project through the south gate. They reported this incident to the Union, and a day or two later, on December 28, the Union extended its picket line to within a few feet of the south gate, and also began to picket along the fence in front of the area where Hoff's employees were working, between the south gate and the southern boundary of the project. (Pet. App. 4, 54; A. 31-36, 43, 153-157, 170-172, 204-207.) Approximately four days later, after receiving a letter from Hoff's attorney stating that Hoff and its suppliers would use only the north gate, the Union withdrew its pickets from the south gate, but continued to picket at points 150 feet north and south of that gate, on advice of counsel (Pet. App. 4-5, 53-54; A. 36-40, 44-46, 157-158, 169-170, 201-202, 210, 224-225). At the end of January 1978, the pickets were enjoined from picketing anywhere except within 25 feet of the north gate (Pet. App. 5 n.3, 54; A. 47, 160). There is no evidence that any employee refused to enter the construction site as a result of the Union's picketing.

2. The Board, with one member dissenting, found that the Union did not violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), by picketing near the south gate, because supplies for Hoff's use were being delivered regularly through that gate. The Board majority relied upon the Fifth Circuit's holding in *Linbeck Construction Corp.* v. *NLRB*, 550 F. 2d 311, 318 (1977), that "any gate used to deliver materials essential to the primary employer's normal operations is subject to lawful picketing," and concluded that the electrical fixtures delivered by Consolidated, which were an integral and necessary component of the electrical system which Hoff had been engaged to install in the pro-

ject, were "essential" to Hoff's normal operations at the project. Accordingly, the Board dismissed the complaint.[3] (Pet. App. 40-42, 55-61.)

3. A divided panel of the court of appeals affirmed the Board's decision. After reviewing the law of common situs picketing, which recognizes that neutral employees delivering supplies for the primary employer are a traditional object of lawful, primary picketing, the court stated (Pet. App. 10-11; emphasis in original):

> These principles are not in dispute in this case; since Consolidated concededly used the neutral south primary gate regularly, our analysis would end here were it not for the argument advanced by Hoff that Consolidated was not one if *its* suppliers, but rather a supplier to the project owner who ordered and paid for the fixtures, and thus was in fact simply another subcontractor on the project, making deliveries to the owner, and properly using the neutral gate. The issue of who must use the reserved gate in order to avoid the legitimate picketing of an assertedly "neutral" gate is the focus of the dispute in this case.

Agreeing with the Fifth Circuit's reasoning in *Linbeck Construction Corp.* v. *NLRB, supra,* the court held that the Board's approach to determining who is a "supplier" of the primary employer correctly rested upon a determination whether the supplies were intended for the use of the primary employer, and not upon whether the primary employer was the legal owner of the supplies. It explained (Pet. App. 15):

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[3]The Board also found, without dissent, that the Union's picketing in the area south of the south gate, where Hoff's employees were working on the construction in progress, was lawful. The court of appeals affirmed this finding (Pet. App. 20-22), and petitioner has not challenged it in this Court.

> [W]e agree with the Board's rejection of any formalistic notion of legal ownership of materials delivered in favor of a more realistic analysis focusing on the intended use of the supplies. Thus if in fact and practice, Consolidated was delivering supplies which in the normal course of its business Hoff used and installed, Consolidated was a "supplier" of Hoff, no matter where legal title to the supplies might lie, and by using the south gate Consolidated contaminated its neutrality, permitting its picketing by the Union.

The court concluded that Consolidated was Hoff's supplier under this test: "[I]t is hard to think of a supply more essential to electrical installation work than light fixtures" (Pet. App. 19).

ARGUMENT

The decision of the court of appeals is correct, and involves only the application of settled principles to the facts of this case. There is no conflict among the circuits on the narrow issue presented here, and further review is therefore unwarranted.

1. Section 8(b)(4)(B) of the Act was designed to preserve "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes" and, at the same time, to shield "unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). Application of Section 8(b)(4)(B) thus requires that the union conduct at issue be classified either as legitimate "primary" activity directed against the offending employer with whom the union has a labor dispute, or as unlawful "secondary" activity directed against a neutral employer with whom the union does not have a dispute.

Where, as here, the primary and neutral employers perform separate work on the same premises (a common situs),

the distinction between primary and secondary activity is often difficult to draw. In *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950), the Board enunciated certain criteria as guides for determining whether common situs picketing is primary or secondary. It explained (92 N.L.R.B. at 549; emphasis in original & footnotes omitted) that picketing is presumptively primary if:

> (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises, (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*, (c) the picketing is limited to places reasonably close to the location of the *situs*, and (d) the picketing discloses clearly that the dispute is with the primary employer.

In applying the third *Moore Dry Dock* criterion, the Board has held that picketing on a construction site, at gates reserved exclusively for neutral employers, is not "reasonably close" to the situs of the dispute with the primary employer and thus violates Section 8(b)(4)(B) of the Act. *Building & Construction Trades Council of New Orleans, AFL-CIO (Markwell & Hartz, Inc.)*, 155 N.L.R.B. 319, 323-327 (1965), enforced, 387 F. 2d 79, 83 (5th Cir. 1967), cert. denied, 391 U.S. 914 (1968). However, the Board has further held that, if, after separate gates are established, the primary employer or his suppliers or deliverymen continue to use the gate supposedly reserved for neutrals, that gate may lawfully be picketed. *Markwell & Hartz, Inc., supra*, 155 N.L.R.B. at 326 n.22; *West Kentucky Building & Construction Trades Council (Daniel Construction Co.)*, 129 N.L.R.B. 272, 276 n.15, 277 (1971); *Local 519, Plumbers & Pipefitters Union (Center Plumbing & Heating Corp.)*, 145 N.L.R.B. 215, 223 (1963). This is because, as this Court has repeatedly held, legitimate primary activity "is aimed at applying economic pressure by halting the day-to-day

operations of the struck employer." Such pressure is not limited to appealing to the primary employer's own employees, but "has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt." *Steelworkers* v. *NLRB*, 376 U.S. 492, 499 (1964); *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 388 (1969). See *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665 (1951).

2. Petitioner does not disagree with any of the principles stated above; to the contrary, petitioner conceded in the court of appeals (Br. 15) that "the integrity of a proper reserved gate system requires that not only the employees of the primary employer, but also the employees of the primary's suppliers utilize only the reserved primary gate and refrain from using the gate reserved for neutral employers and their suppliers and subcontractors." Accordingly, there is no dispute that, if Consolidated were a supplier of Hoff, the Union could legitimately picket at the south gate where the Consolidated delivery truck entered the construction site. The only issue in this case, therefore, is whether the Board and the court of appeals erred in finding that Consolidated was a supplier of Hoff. Such a narrow question, which turns on an evaluation of the facts of this particular case, does not warrant review by this Court. Moreover, the finding of the Board and the court of appeals is clearly reasonable.

As shown (*supra*, pages 2-3), the Consolidated truck's only business at the construction site was to deliver materials to be used solely by Hoff in its normal operations at the site. Consolidated's deliveries were scheduled according to Hoff's needs, and no one other than Hoff's employees handled the fixtures after delivery. During the period prior to February 7, when Hoff had no trailer on the project site in which the fixtures could conveniently be stored, Consoli-

dated delivered the fixtures to the project owner's trailer. However, the project owner did nothing with the fixtures other than accept delivery; Hoff's foreman opened the boxes of fixtures and transported them to the jobsite where Hoff's employees installed them. After Hoff brought its own trailer onto the jobsite, Hoff's foreman also began accepting deliveries and initialing the invoices. No other subcontractor at the construction site did any work involving the fixtures delivered by Consolidated. Even the dissenting judge below acknowledged (Pet. App. 24) that in these circumstances Consolidated "seems to be a supplier of Hoff."

3. Petitioner, like the dissenting judge in the court below (Pet. App. 23-28), contends (Pet. 14-18) that, because Consolidated was independent of Hoff and sold electrical fixtures directly to the project owner who retained title to them, Consolidated may not properly be treated as a supplier of Hoff for purposes of Section 8(b)(4)(B). To treat it as Hoff's supplier in these circumstances, they contend, would be to disregard the holding in *NLRB* v. *Denver Building & Construction Trades Council, supra,* 341 U.S. at 689-690, that separate employers in the construction industry do not lose their independent contractor status merely because they work together on the same construction project. This contention misconceives the scope of the Board's decision in this case. The Board did not hold that the Union could lawfully picket either the project owner or the other contractors on the construction site. Rather, the Board held only that the Union could picket Hoff at the gate through which its supplies were being delivered. Nor does this decision subject a general contractor to picketing merely because he supplies materials or machinery to the primary employer (Pet. 15-16). As the court below emphasized (Pet. App. 18; emphasis in original):

> We find it significant that this supplier delivered products used *only* by Hoff, not other subcontractors; therefore, any disruption caused if the Union should be successful in its appeal to Consolidated's deliveries would not spread to anyone but the primary employer. The ease with which any impact on the other, neutral subcontractors on the site could be completely avoided simply by requiring Consolidated to deliver its products through the reserved gate; illustrates the limited intended impact of the Union's action. We need not engage in any sophisticated discussions of more attenuated connections in other cases.

4. The decision of the court of appeals does not, as petitioner contends (Pet. 21-22), conflict with the decisions of the Sixth and the Ninth Circuits in *NLRB* v. *Nashville Building & Construction Trades Council*, 383 F. 2d 562 (6th Cir. 1967), and *Carpenters Local 470* v. *NLRB*, 564 F. 2d 1360, 1362 (9th Cir. 1977). Those cases hold only that the "work relatedness" test applied to primary activity at an industrial plant in *Local 761, Electrical Workers* v. *NLRB* (*General Electric Co.*), 366 U.S. 667 (1961),[4] is not applicable to the relationship among the various contractors on a

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[4]In *General Electric*, the union representing the production and maintenance employees at the company's plant called a strike over contract terms and established picket lines at the various gates of the plant. The company, in addition to receiving deliveries and supplies from neutral employers, also had at work on its premises a number of independent contractors who, with their employees, were performing a variety of tasks ranging from construction of new buildings to general maintenance work. The company, in an effort to minimize the impact of the picketing on these independent contractors, set aside a separate gate exclusively for their use. This Court held that the legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was unlawful secondary activity.

construction project. The court below accepted that limitation on the *General Electric* holding dictated by the thrust of *Denver Building Trades*; thus it recognized (Pet. App. 13 n.7) that, under *Denver Building Trades*, "a dispute with the general contractor does not justify picketing of an entire construction project, whether on the theory that all subcontractors are 'employees' of the general contractor or on the theory that they are all doing 'related work.' " But, as the court below properly concluded, *Denver Building Trades* does not answer the problem here, "which is identifying the 'customers and suppliers' [of the primary employer] who *are* legitimate objects of the union's appeal" (*ibid.*; emphasis in original); see also Pet. App. 12, 16).

The court's resolution of that problem is in accord with the decision of the Fifth Circuit in *Linbeck Construction Corp.* v. *NLRB*, 550 F. 2d 311 (1977), which involved a similar situation. The court there held that a supplier who, like Consolidated here, delivered materials that were solely for, and essential to, the primary employer's normal operations on a construction site could lawfully be picketed at a "neutral" gate on that site. Rejecting the contention that the picketing was secondary because the primary employer did not have title to the materials, the court stated (550 F. 2d at 318):

> If we were to adopt [that] reasoning, general contractors throughout the construction industry could stop a "traditional goal of primary pressure"—halting the operations of the primary employer through the influence of a picket line on those suppliers who contribute thereto—by the simple expedient of retaining legal title to all materials to be used by the sub-contractors.

The court here properly declined to rely on such technical distinctions in resolving the narrow question whether Consolidated was a supplier of Hoff for the purposes of Section 8(b)(4)(B).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 80-1173

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October Term, 1980

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NATIONAL LABOR RELATIONS BOARD AND LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

OBJECTION OF RESPONDENT, LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS TO THE CHAMBER OF COMMERCE'S MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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OBJECTION OF RESPONDENT, LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS TO THE CHAMBER OF COMMERCE'S MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Respondent, Local Union 323, International Brotherhood of Electrical Workers, files this Objection to the Motion of the Chamber of Commerce for leave to file a Brief *Amicus Curiae* in accordance with Rule 36.3, Rules of the Supreme Court.

I. THE ARGUMENT OF THE PETITIONER IS WELL PRESENTED AND DOES NOT REQUIRE ADDITIONAL ARGUMENT BY THE CHAMBER OF COMMERCE

The Chamber of Commerce has admitted that "counsel for Petitioner has represented the interests of his client well". Motion of the Chamber of Commerce, page ii.

Since Petitioner's contentions are thoroughly and competently advanced, there is no need to obfuscate the issues in this case by allowing the Chamber of Commerce to file a duplicative brief.

II. THE ISSUES IN THIS CASE ARE SIMPLE AND FOLLOW LONG ESTABLISHED PRECEDENT

The central issue in this case is whether a construction site gate may be picketed when supplies intended for the primary employer are delivered through that gate.

This issue has long ago been resolved by this Court in *United Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 492, 499 (1964); *Local 761, International Union of Electrical Workers v. NLRB*, 371 U.S. 667, 681 (1961); and has repeatedly been applied to suppliers at common situs construction projects; *see, e. g., Building and Construction Trades Council of New Orleans (Markwell & Hartz, Inc.)* 155 NLRB 319 (1965), *enf.* 387 F 2d 79 (5th Cir. 1967), *cert. den.* 391 U.S. 914 (1968).

The proposed brief of the *amicus curiae* unnecessarily seeks to complicate the issue in this case by arguing that the purchase of the supplies by the owner-developer, installed and used by

the primary employer, involves consideration of "neutral employers" under this Court's decision in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). Such a contention, thoroughly argued by Petitioner, attempts to avoid the real issue in this case—whether a union may picket a gate at a construction site if supplies intended for use by the primary employer are delivered through that gate.

The brief of the Chamber of Commerce adds confusion to a simple, uncomplicated case and Motion for leave to file a brief *amicus curiae* should be denied.

III. CONCLUSION

The Chamber of Commerce's interest in this case, and its proposed brief, is duplicative of that of the Petitioner and serves to confuse, rather than clarify, the issues presented. For these reasons, the Motion for leave to file a brief *amicus curiae* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Objection of Respondent, Local 323, International Brotherhood of Electrical Workers, to the Chamber of Commerce's Motion for Leave To File A Brief *Amicus Curiae* was deposited in the United States mail, with first-class postage prepaid and addressed to:

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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No. 80-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J.F. HOFF ELECTRIC CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 36.1, for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case. This motion is necessitated by the refusal of Respondent Local Union 323, International Brotherhood of Electrical Workers, to consent to the filing of the appended brief.[1]

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[1] Respondent National Labor Relations Board (by the Solicitor General) and the Petitioner have consented pursuant to Supreme Court Rule 36.2.

The interest of the *amicus curiae* is described in its brief. To summarize, the Chamber of Commerce is the major federation of business and professional organizations, large and small, with more than 90,000 members. Many of its members are small business organizations engaged in the construction industry.

The Court of Appeals' holding permits a labor union to picket a construction site gate reserved for neutral contractors simply because supplies eventually to be used by the primary employer in its work on the site are delivered through the gate by an outside supplier to the independent neutral contractor (the project owner) which ordered them.

By creating uncertainty whether Congress' objective of "shield[ing] unoffending employers and others from pressures in controversies not of their own" at construction sites retains vitality, *NLRB* v. *Denver Building and Const. Trades Council,* 341 U.S. 675, 692 (1951), the Court of Appeals' decision directly affects many of the Chamber's members—not only construction contractors, but their suppliers and customers, as well. They can no longer accurately determine their rights under § 8(b)(4) of the National Labor Relations Act,[2] or reasonably assess their exposure to costly work interruptions and delays. Indeed, the decision below may foster picketing which closes down entire construction sites, since neutral gates once thought secure may now be found "tainted." To the extent inroads are permitted on the protection afforded employers by the Court's decision in *Denver Building Trades,* the Chamber's members thus are vitally concerned.

While counsel for Petitioner has represented the interests of his client well, the Chamber believes it would be

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[2] 29 U.S.C. §§151, 158(b)(4).

helpful for the Court to be apprised of the views of the broader business community regarding the decisions below, and therefore, of the necessity for resolving the issue presented by the petition. Because of its large and varied constituency, the Chamber is especially suited to fulfill this duty. The Chamber also believes that it may illuminate certain issues raised by the Court of Appeals' exposition, such as that court's dubious reliance on a discredited "economic realities" rationale (see Brief, *infra* at pp. 7-10), which have been not fully explored elsewhere.

For these reasons, we respectfully request that this Motion for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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J.F. HOFF ELECTRIC CO.,

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NATIONAL LABOR RELATIONS BOARD and LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Interest of the Amicus Curiae*

The Chamber of Commerce of the United States of America (hereinafter "the Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade and professional organizations in the United States. It has a total membership in excess of 90,000 business firms

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* Although Petitioner and Respondent National Labor Relations Board have consented to the participation of the Chamber of Commerce in this proceeding, Respondent Local 323, International Brotherhood of Electrical Workers, has not. Accordingly, a motion for leave to file this brief is filed herewith. Supreme Court Rule 36.1.

and individuals, including more than 3,800 state and local chambers of commerce and trade associations. A majority of the Chamber's members are small businesses, each employing 100 or fewer employees. In order to represent its members' views of questions of importance to their vital interests, and to assist this Court in its deliberations on such matters, the Chamber has frequently participated as *amicus curiae* before this Court in cases concerning the interpretation of the National Labor Relations Act ("the Act").[1]

At issue in this case is whether a secondary employer at a construction site (the project owner) loses its status as a neutral under the Act, and therefore must suffer picketing at its separate reserved gate, merely because the primary employer (an electrical subcontractor), with whom a union has a dispute, as a small portion of its work installs lighting fixtures which were acquired by the project owner from an outside supplier. A divided Court of Appeals sustained the National Labor Relations Board's determination that the neutrality of the reserved gate was breached by the delivery of the fixtures to the project owner through that portal. It therefore held that the picketing at the reserved gate was lawful.

The issue presented by this case is of vital concern to the Chamber, since many of its members are contractors engaged in the construction industry. The decision of the Court of Appeals, if sustained, would upset the delicate balance of economic power between employers and labor organizations established by this Court for the construction industry thirty years ago. *NLRB* v. *Denver Bldg.*

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[1] 29 U.S.C. §§151, *et seq.* *See*, e.g., NLRB v. Retail Store Employees Union, —— U.S. ——, 100 S.Ct. 2372 (1980); Connell Constr. Co. v. Plumbers and Steamfitters Local Union 100, 421 U.S. 616 (1975). This case involves a construction of §8(b)(4), 29 U.S.C. §158(b)(4).

and Construction Trades Council, 341 U.S. 675 (1951). It would seriously endanger many small businesses engaged in the industry by subjecting them to picketing in labor disputes not of their own making. Accordingly, the Chamber submits this brief *amicus curiae* in support of the petition for certiorari filed by the J.F. Hoff Electric Co.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Determine Whether Its Decision in *General Electric* Has an Impact on *Denver Building Trades,* Thereby Resolving a Conflict in the Circuits as to the Permissible Scope of Reserved Gate Picketing at Construction Sites.

Describing the issue before the Court of Appeals, Judge Wald wrote for the majority:

> This case poses the problem of whether a "neutral gate," set up by a construction contractor to insulate neutral employers at a common site from the impact of union picketing, lost its protected status when supplies, *intended to be used by the primary employer* but ordered and owned by the owner of the construction project, were delivered through the gate.

(Pet. App. 2) (emphasis added).[2] The court below, over the dissent of Judge Wilkey (but in agreement with the Board), held that it did. Thus, the Court of Appeals concluded that "when one subcontractor delivers goods to a job site to be used solely by another subcontractor who is

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[2] "Pet. App." refers to the Appendices to the Petition for Certiorari containing the decisions below.

the primary employer," picketing at the point of entry to the site is permissible, regardless of where legal title to the materials may lie. (Pet. App. 12-13, 14). The ultimate question, however, is whether this "intended use" test is appropriately applied to construction site cases.

In *NLRB* v. *Denver Bldg. and Construction Trades Council*, 341 U.S. 675 (1951), this Court held that, despite a general contractor's exercise of "some supervision" over a subcontractor working at the same site, and their engagement in the same general business, they remained "independent contractors" for purposes of § 8(b)(4) of the Act, and that this relationship was "too well established in the law to be overridden without clear [statutory] language doing so." *Id.* at 690 and n.19. Therefore, it held, a building trades union violated the Act when it engaged in a strike and picketing with an object of forcing a general contractor on a construction project to terminate its contract with a non-union subcontractor. The *Denver Building Trades* case appeared to establish broad protection for construction site contractors, despite their functional interrelationship, against secondary picketing.[3]

Here, in contrast, the Court of Appeals applied to the construction industry a variant of the "work relatedness" test, developed in this Court's decisions post-dating *Denver Building Trades* pertaining to industrial plants: *Local 761, International U. of Elec. Wkrs.* v. *NLRB*, 366 U.S. 667 (1961) (the "*General Electric*" case), and *United Steelworkers of America* v. *NLRB*, 376 U.S. 492 (1964) (the "*Carrier Corporation*" case). In these decisions, the Court

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[3] As we state in Point II, *infra* pp. 7-10, this Court has continued to recognize the close working ties among construction site enterprises and, furthermore, Congress has refused to pass the kind of overruling legislation envisioned by the Court in *Denver Building Trades*.

limited the protection afforded by a manufacturer's "neutral" gate to "work done by . . . secondary employees [which] is unrelated to the normal operations of the primary employer . . . ," *General Electric*, 366 U.S. at 679; *Carrier Corporation*, 376 U.S. at 497-98. It affirmed the employees' right "to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day services essential to the plant's regular operations." *Carrier Corporation*, 376 U.S. at 499 (footnote omitted).

This "work relatedness" test, however, has been limited in application to the manufacturing sector. The courts of appeals have refused to extend it to the construction industry. *Markwell and Hartz, Inc.* v. *NLRB*, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968); *Carpenters Local 470* v. *NLRB*, 564 F.2d 1360, 1362 (9th Cir. 1977); *NLRB* v. *Nashville Bldg. and Const. Trades Council*, 383 F.2d 562, 565-66 (6th Cir. 1967). Even the Fifth Circuit in *Linbeck Construction Corp.* v. *NLRB*, 550 F.2d 311 (5th Cir. 1977), upon which the Board and Court of Appeals rely here, professed to follow this approach. *Id.* at 316.

Although questioning whether *Denver Building Trades* "survived the *General Electric* decision" (Pet. App. 15), the Court of Appeals nevertheless attempts to deny that its holding represents an extension of the "work relatedness" test to the construction industry. Citing *Linbeck*, it asserts that its standard applies only where the deliveries are "essential to the normal operations" of the primary employer, and thus maintains that its holding is "far narrower" than the criterion used in *General Electric*. We doubt this.

First, the Court of Appeals' own formulation of the issue, *supra* p. 3, says nothing about "essentiality" or "normal operations." It looks only to the identity of the intended user of the materials being delivered. This focus

on the supplier relationship—a "commonsense" approach, according to the Court of Appeals majority (Pet. App. 20 n.11)—is the very sort of inquiry contemplated by *General Electric*. Second, as observed by Judge Wilkey, the *Linbeck* court "drew its analysis primarily from *General Electric* and [*Carrier Corporation*], a second industrial plant picketing case"; and *General Electric*, itself, spoke of work "necessary to the normal operations" of the primary employer, 366 U.S. at 682, "thus leaving no vestige of difference in the majority's 'essential to normal operations' standard" (Pet. App. 35). In short, the Court of Appeals appears to have applied the *General Electric* standard to a construction site case.

Judge Wilkey's dissent dramatically describes the sweep of the majority's holding and the basis for the Chamber's concern. On construction sites, he noted, "[*i*]*t is difficult to imagine any relationship between independent contractors that is not either supplier or customer.*" (Pet. App. 29) (emphasis in original). And since both suppliers and customers of a primary employer may be subject to picketing under the Court of Appeals' analysis (Pet. App. 28), almost all related enterprises may be drawn into a dispute. Thus, we are as bewildered as Judge Wilkey when he wrote, "What this approach leaves of *Denver Building* is hard to see." (Pet. App. 30)

The question deserves an answer by this Court.

II.

Review Is Warranted to Determine Whether a Discredited "Economic Realities" Rationale May Be Employed to Overcome the Independent Contractor Status of Construction Site Enterprises, and Thus Avoid a Secondary Boycott Finding.

In sustaining the NLRB's decision dismissing Hoff's §8(b)(4) complaint, the Court of Appeals held:

> Applying the principles underlying *General Electric* to the question of who is a "supplier" or "customer" to whom the pickets may legitimately appeal, *we agree with the Board's rejection of any formalistic notion of legal ownership of materials delivered in favor of a more realistic analysis focusing on the intended use of the supplies.* Thus if in fact and practice, Consolidated [the company supplying lighting fixtures for installation on the site] was delivering supplies which in the normal course of its business Hoff used and installed, Consoliated was a "supplier" of Hoff, no matter where legal title to the supplies might lie,[4] and by using the South gate [reserved for contractors other

[4] Member Murphy, dissenting from the Board's decision, noted that the fixtures continually had been "selected, ordered, purchased, delivered to, received, owned and stored by the projected owner itself, and not Hoff." (Pet. App. 45) (emphasis in original). Thus, the project owner undertook complete responsibility for obtaining the lighting fixtures to be used on the site; Hoff's obligation was limited to installing the fixtures so obtained (Pet. App. 44). This is *not* a case where, on the eve of picketing, the parties undertook to disguise the primary's interest as the true purchaser of materials in order to reduce the primary's exposure to lawful economic pressure. (Pet. App. 33, 36 n.30) *Cf.* International Union of Operating Engineers, Local Union No. 451, AFL-CIO (Linbeck Construction Corp.), 219 N.L.R.B. 997, 1002 (1975), *enforced*, 550 F.2d 311, 317-18 (5th Cir. 1977) (employees of general contractor began receiving materials on site only after picketing of the primary had begun).

> than Hoff] Consolidated contaminated its neutrality, permitting its picketing by the Union.

(Pet. App. 15) (emphasis and material in brackets added). The Court of Appeals continued:

> [*W*]*e approve the Board's looking to the realities of the relationships* [*"applying a commonsense test focusing on who is actually delivering supplies for the use of the primary employer"*] *rather than to the formalities of legal title.* We affirm the Board's conclusion that no unfair labor practice was committed by the Union's picketing of the South gate.

(Pet. App. 20; bracketed matter, *id.*, n.11) (emphasis added).

The emphasized passages harken back more than three decades to this Court's decisions in *NLRB* v. *Hearst Publications,* 322 U.S. 111 (1944), *United States* v. *Silk,* 331 U.S. 704 (1947), and *Bartels* v. *Birmingham,* 332 U.S. 126 (1947), which Congress was to reject. The "realities-of-the-relationships" standard used in this case by the Board and Court of Appeals majorities to escape the consequence of treating construction site enterprises as independent contractors, *see Denver Building Trades, supra,* is the lineal descendant of the "economic facts" or "economic reality" rationales of *Hearst* and *Silk,* respectively.[5] Those rationales also had as their aim the avoidance of independent contractor treatment. In *Hearst,* for example, the Court held that independent merchants who bought newspapers from a publisher were "employees" of the publisher, even though these merchants had employees of their own. It believed that the broad social purposes of the

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[5] *See Hearst, supra,* 322 U.S. at 128; *Silk, supra,* 331 U.S. at 713. *See also, Bartels, supra,* 332 U.S. at 130 ("economic reality").

Act could be achieved only by restricting the scope of exempt classifications.

As this Court later recognized, however, Congress in 1947 repudiated such a "standard . . . of economic and policy considerations within the labor field" in favor of the application of traditional agency principles under common law. *NLRB* v. *United Insurance Co.,* 390 U.S. 254, 256 (1968). Congress would not condone a standard "whose 'basic principle is a dimensionless and amorphous abstraction. . . .'" *See United States* v. *W. M. Webb Co.,* 397 U.S. 179, 188 (1970) (quoting S. Rep. No. 1255, 80th Cong., 2d Sess., at 12 (1948) [Report of the Senate Finance Committee on a joint resolution disapproving application of the "economic reality" test to determine employee status under Federal Insurance Contributions Act and Federal Unemployment Tax Act]).[6]

Here, the "realities" test of the Court of Appeals is similarly afflicted. Considering the close functional relationship among construction site enterprises, *see National Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612, 639 (1967); *Connell Const. Co.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 629-30 (1975), and the common practice of owners and general contractors to assume responsibility for acquiring materials to be installed by subcontrctors,[7] the "realities of the relationships" may

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[6] Ironically, in spurning another recent Board attempt to avoid an independent contractor determination based on "the 'business realities' of the relationships" (between taxicab companies and their lessee drivers), the District of Columbia Court decried such "realities" as "vague generalities [which] do not rise to the dignity of factual findings." Local 777, Democratic Union Organizing Comm'ee, S.E.I.U. v. NLRB (Yellow Cab Co.), 603 F.2d 862, 908 (D.C. Cir. 1978). But the same court made no attempt to distinguish *Yellow Cab* from its decision here.

[7] Petition, at 15.

take the Board (or a reviewing court) as far as a particular panel chooses to go. It is an unbridled license for the agency or court to permit secondary picketing regardless of the facts. That disregard is especially evident where, as here, the facts demonstrate a bona fide proprietary interest by the neutral secondary in acquiring the disputed materials. See n. 4, *supra* p. 7. Evidently recognizing the dangers inherent in such a rationale, Congress has consistently rebuffed attempts to overrule *Denver Building Trades* by those pointing to the same "economic realities in the construction industry" which are advanced here. *See* H. R. Rep. No. 96, 95th Cong., 1st Sess., 6 (1977), and other proposals cited by Judge Wilkey (Pet. App. 37-38).

This Court should accept review to determine whether the Court of Appeals' reasoning is consistent with Congress' intent that the Board to adhere to commonly accepted principles of independent contractor status and that it give effect to the consequences which derive from that status in administering the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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